(16)

No. 03-407
Title: John F. Kowalski, Judge, 26th Judicial Circuit Court of Michigan, et al., Petitioners
v.
John C. Tesmer, et al.
Docketed: September 16, 2003
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (00-1824, 00-1845)
Decision Date: June 17, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 12 2003	Petition for writ of certiorari filed. (Response due October 16, 2003)
Oct 3 2003	Waiver of right of respondents John C. Tesmer, et al. to respond filed.
Oct 15 2003	DISTRIBUTED for Conference of October 31, 2003.
Oct 28 2003	Response Requested . (Due November 28, 2003)
Nov 7 2003	Brief amicus curiae of Wayne County, Michigan filed.
Nov 26 2003	Response to petition from respondents John C. Tesmer, Charles Carter, Alois Schnell, Arthur Fitzgerald, and Michael Vogler filed.
Dec 10 2003	DISTRIBUTED for Conference of January 9, 2004.
Jan 12 2004	DISTRIBUTED for Conference of January 16, 2004.
Jan 20 2004	Petition GRANTED.
Jan 29 2004	Brief amicus curiae of Wayne County Michigan filed.
Feb 13 2004	Joint appendix filed.
Feb 26 2004	Extension of time within which to file petitioners' brief on the merits to and including April 2, 2004.
Apr 2 2004	Brief of petitioners Judge John F. Kowalski, Judge William A. Crane, and Judge Lynda L. Heathscott filed.
Apr 2 2004	Brief of respondent Judge Dennis C. Kolenda in support filed.
Apr 2 2004	Brief amici curiae of Iowa, et al. filed.
Apr 16 2004	Extension of time within which to file the brief on the merits of respondents Tesmer, et al. to and including June 7, 2004.
Jun 4 2004	Brief of respondents John C. Tesmer, et al. filed.
Jun 7 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jun 7 2004	Brief amicus curiae of American Bar Association filed.
Jun 7 2004	Brief amicus curiae of National Legal Aid and Defender Association filed.
Jul 8 2004	Reply of petitioners John F. Kowalski, Judge, 26th Judicial Circuit Court of Michigan, et al. filed.
Jul 9 2004	Reply of respondent Dennis C. Kolenda in support of petitioners filed.
Jul 23 2004	CIRCULATED.
Jul 30 2004	Record received fro U.S.C.A. 6th Circuit. (1 binder)
Aug 3 2004	Record received from U.S.D.C. Eastern Dist. of Michigan, Northern Divison. (1 envelope)
Aug 24 2004	SET FOR ARGUMENT Monday, October 4. 2004.

Sep 7 2004	Supplemental brief of respondents John C. Tesmer, et al. filed. (Distributed)
Oct 4 2004	Argued. For petitioners: Thomas L. Casey, Solicitor General, Lansing, Mich. For respondents: David A. Moran, Detroit, Mich.

Supreme Court, U.S.
FILED

(1)

No. 03- 03 407 SEP 12 2003

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In the

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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207 pp

QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, §20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that criminal defendants who plead guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

II. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

PARTIES TO THE PROCEEDING

In the courts below, the plaintiffs challenging the constitutionality of the Michigan statute were three indigent criminal defendants, John Tesmer, Charles Carter, and Alois Schnell, and two criminal defense attorneys, Arthur Fitzgerald and Michael D. Vogler (referred to as "Respondent Attorneys" in this Petition).

The defendants below and the Petitioners here are three Michigan State court judges, John F. Kowalski, William A. Crane, and Lynda L. Heathscott.

The then Attorney General of Michigan, Jennifer M. Granholm, was initially named as a defendant but was dismissed by the District Court, was not a party to the appeal below, and pursuant to S Ct R 12.6 Petitioners believe she has no interest as a party in the outcome of this Petition.

The District Court entered an opinion and order on March 31, 2000, declaring the State statute unconstitutional.

On June 30, 2000, the District Court entered an injunction against Petitioner Heathscott; against another State judge, Respondent Dennis C. Kolenda, who was not a party to the lawsuit; and purportedly against all other Michigan State judges. The interests of Respondent Judge Kolenda are not adverse to the interests of Petitioners.

Petitioners Judges Heathscott, Kowalski, and Crane appealed to the United States Court of Appeals for the Sixth Circuit in case No. 00-1824. Respondent Judge Kolenda filed a separate appeal in case No. 00-1845. The Court of Appeals issued a joint *en banc* opinion and judgment on rehearing in the two appeals on June 17, 2003.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 3

STATEMENT OF THE CASE 7

A. The Michigan Framework for Appeals From Guilty Pleas 7

B. The Present Lawsuit 10

REASONS FOR GRANTING THE WRIT 12

I. Whether an Indigent Criminal Defendant Convicted on a Guilty Plea Has a Constitutional Right to Appointed Appellate Counsel for a Discretionary First Appeal is an Important Federal Question That Has Not Been Decided by This Court, and the Court of Appeals Decision Directly Conflicts With a Decision of the Michigan Supreme Court. .. 13

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Pleas. 15

B. Defendants Who Plead Guilty Have an Adequate Opportunity to Present Their Claims Fairly and Receive A Meaningful Appeal 19

II. Whether Attorneys Have Third-Party Standing To Make A Constitutional Challenge To A State Statute Prohibiting Appointment Of Appellate Counsel For Indigents

In Discretionary First Appeals Following Guilty Plea Convictions Is An Important Federal Question That The Court Of Appeals Decided In A Way That Is Contrary To This Court's Decisions 22

A. Respondent Attorneys Have, At Most, Standing to Bring Only their Own Claims. 23

B. Respondent Attorneys Do Not Have Third-Party Standing because they have not suffered sufficient injury in fact, they do not have a sufficiently close relation to future indigent defendants, and there are no significant obstacles to the future defendants bringing their own claims. 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Brady v United States,
397 US 742 (1970) 15

Brady, McMann v Richardson,
397 US 759 (1970) 15

Caplin & Drysdale, Chartered v United States,
491 US 617 (1989) 25

Douglas v California,
372 US 353 (1963) 13

Griffin v Illinois,
351 US 12 (1956) 21

Hill v Lockhart,
474 US 52 (1985) 16

In re Guilty Plea Cases,
395 Mich 122; *235 NW2d 132* (Mich 1975) 16

McKane v Durston,
153 US 684 (1894) 13

Parker v North Carolina,
397 US 790 (1970) 15

People v Bulger,
462 Mich 495; 614 NW2d 103 (2000)
cert denied, 531 US 994 (2000) ..... passim

People v Saffold,
465 Mich 268; *631 NW2d 320* (Mich 2001) 16

Powers v Ohio,
499 US 400 (1991) 24

Ross v Moffitt,
417 US 600 (1974) ..... passim

Singleton v Wulff,
428 US 106 (1976) 27

Smith v Robbins,
528 US 259 (2000) 18, 21

Tesmer v Granholm,
114 F Supp 2d 603 (ED Mich, 2000) 1

Tesmer v Kowalski(on en banc rehearing),
*333 F 3d 683 (*6th Cir, 2003) 3

Tesmer v Kowalski,
114 F Supp 2d 622 (ED Mich, 2000) 2

Tesmer v Kowalski,
295 F 3d 536 (6th Cir, 2002) 2

Tesmer v Kowalski,
307 F 3d 459 (6th Cir, 2002) 2

Tollett v Henderson,
411 US 258 (1973) 15, 16

United States Department of Labor v Triplett,
494 US 715 (1990) 25

Warth v Seldin,
422 US 490 (1976) 12, 23, 24, 26

Younger v Harris,
401 US 37 (1971) 22

Statutes
28 USC § 1254(1) 3

28 USC § 1331 7

28 USC § 1343(a)(3) 7

28 USC § 1343(a)(4) 7

42 USC §1983 ..... 7, 27

MCL 257.625 10

MCL 600.308(2)(d) 7

MCL 600.601 9

MCL 600.6419 9

MCL 600.8301 9

MCL 600.8311 9

MCL 750.110a 10

MCL 750.91 10

MCL 769.11 10

MCL 770.3(1)(d) 7

MCL 770.3a ..... passim

MCL 770.3a(2) 17

MCL 770.3a(2)(c) 9

Rules
MCR 2.119(A) 20

MCR 6.001(D) 20

MCR 6.005(H)(2)-(3) 19

MCR 6.301(C)(2) 18

MCR 6.302 15

MCR 6.302(B)(5), (6) 5, 16

MCR 6.433 20

MCR 7.205 9

MCR 7.205(D)(2), (3) 9

Constitutional Provisions
Mich Const 1963, art I, §20 i

Mich Const 1963, art VI, §13 9

US Const, Art III 24

OPINIONS AND ORDERS BELOW

On March 31, 2000, the United States District Court for the Eastern District Of Michigan entered an opinion and order declaring that both Michigan Compiled Law (MCL) 770.3a and the practice of denying appointed appellate counsel to indigent criminal defendants who have been convicted by guilty pleas[1] unconstitutionally denied them equal protection and due process under the United States Constitution; declaring that Respondent Attorneys had third-party standing; abstaining from deciding Respondent Tesmer's claims, but not Respondent Carter's or Schnell's; and dismissing defendant Attorney General. The Court granted in part and denied in part Petitioners' motion to dismiss and denied Respondents' motion for a preliminary injunction. *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). App. 87a.

In proceedings not pertinent to the present Petition, Petitioners filed a notice of appeal from the March 31, 2000 opinion and order but the notice misidentified the opinion and order and pursuant to a motion by the Respondents the Court of Appeals dismissed that appeal in an unreported order on July 13, 2000. Petitioners filed a motion for rehearing and rehearing *en banc*. On October 13, 2000 the Court denied that motion in an unreported order for the reason that the March 31, 2000 opinion and order did not constitute a final judgment.

Meanwhile, Respondents filed motions in the District Court for class certification and for injunctive relief, contending that Petitioner Heathscott, a Saginaw County Circuit Judge, and Respondent Kolenda, a nonparty Kent County Circuit Judge, were violating the District Court's earlier opinion and order by refusing to appoint appellate counsel for non-party indigent

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[1] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Petition uses the term "guilty plea" to apply to all three types of convictions.

criminal defendants who had been convicted by guilty pleas. On June 30, 2000 the District Court issued an opinion and order that enjoined Petitioner Heathscott and purported to bind Respondent Kolenda and all Michigan State judges from denying appointed appellate counsel. The District Court declined to certify either a plaintiff or a defendant class. *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). App. 125a.

Petitioner Judges appealed from the June 30, 2000 opinion and order. Respondent Kolenda filed a separate appeal. On July 2, 2002, a panel of the United States Court of Appeals for the Sixth Circuit entered a decision concluding that the District Court should have abstained from deciding the claims of all three Respondent criminal defendants; that the Respondent Attorneys had third-party standing; and that MCL 770.3a sufficiently protects an indigent defendant's constitutional rights. The Court dissolved the injunction issued by the District Court, reversed and vacated the grant of declaratory relief, and remanded the matter with instructions to enter judgment in favor of Petitioners. *Tesmer v Kowalski*, 295 F 3d 536 (6th Cir, 2002). App. 63a.

Respondents filed a motion for rehearing *en banc* that was granted on September 20, 2002, which had the effect of vacating the panel decision. *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). App. 85a.

On *en banc* rehearing, the Court of Appeals entered a 7-5 decision on June 17, 2003, affirming the District Court in part and reversing in part. The majority held that abstention applies to the indigent defendants; that the attorney-plaintiffs have third-party standing; that the statute "create[s] a different opportunity for access to the appellate system based upon indigency" and therefore violates due process; but that the injunction was improper with respect to Judge Kolenda and all non-party Michigan State judges. In separate opinions, four

Judges dissented from the holding that the attorneys had third-party standing and four dissented from merits of the constitutional issue, concluding that "the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system." *Tesmer v Kowalski (on en banc rehearing)*, 333 F 3d 683 (6th Cir, 2003). App. 1a.

JURISDICTION

The Court of Appeals *en banc* judgment on rehearing was entered June 17, 2003. No rehearing was sought from that judgment. This Court's jurisdiction in invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

The pertinent federal and Michigan constitutional provisions, statutes, and court rules involved are reproduced in the Appendix at App. 137a.[2]

The challenged statute, MCL 770.3a, (App. 139a) provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

[2] Current versions of the Michigan Court Rules can be found on the Michigan Courts Web site. See, http://courtofappeals.mijud.net/rules/public/default.asp

> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal. [3]

The Michigan Court Rules (MCR) concerning guilty pleas conform to the statute. MCR 6.302(B)(5), (6). (App. 146a):

> (B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

[3] The form is reproduced at App. 157a and can be found on the State Court Administrative Office (SCAO) Web site. See, http://courts.michigan.gov/cao/courtforms/appeals/cc405.pdf

* * *

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;
(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,
(b) the plea is a conditional plea under MCR 6.301(C)(2),
(c) the prosecuting attorney seeks leave to appeal, or
(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

Appeals from criminal convictions based on guilty pleas to both the Michigan Court of Appeals and the Michigan Supreme Court in Michigan's two-tier appellate court system are discretionary. MCL 600.308(2)(d), 770.3(1)(d); App. 139a. A Michigan statute, MCL 770.3a (App. 139a) provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

The basis of jurisdiction of this 42 USC § 1983 lawsuit in the District Court was 28 USC §§ 1331, 1343(a)(3), and 1343(a)(4). Respondents asserted that the practice of denying appointed appellate counsel to guilty-pleading defendants in discretionary first appeals violates their right to equal protection and due process under the United States Constitution and that MCL 770.3a will continue to violate their rights. The United States Court of Appeals for the Sixth Circuit held that it would abstain from deciding the claims of the indigent defendants, that the attorneys had third-party standing, and that MCL 770.3a violates due process.

A. The Michigan Framework for Appeals From Guilty Pleas

In *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000) *cert denied,* 531 US 994 (2000), the Michigan Supreme Court held that neither the Michigan nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction. Because MCL 770.3a did not apply to the defendant there, the precise question of its constitutionality was not before the Michigan Supreme Court,

although the Court explicitly upheld the constitutionality of the practice of denying appointed counsel.

The Court in *Bulger* described in detail the history of the framework for appeals from guilty pleas in Michigan. 462 Mich at 503-506. Before 1994, Mich Const 1963, Art 1, § 20, provided defendants an appeal of right from all criminal convictions and, "as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." Case law provided that defendants could appeal by right from plea-based convictions and therefore there was a right to appointment of appellate counsel. In 1994, a proposal to amend the constitution was submitted to the people to make appeals from plea-based convictions discretionary. In *Bulger*, 462 Mich at 504-505, the Michigan Supreme Court described the reasons for the constitutional amendment and the current status of the law:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and plea-based appeals constituted approximately thirty percent of all appeals facing the Michigan Court of Appeals. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts.
>
> The voters approved [the constitutional amendment] by a margin of sixty-four percent to thirty-six percent. As amended, Const 1963, art 1, § 20 now states that an accused is entitled "to have an appeal as a matter of right, *except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . .*" (Emphasis added.) [The amendment] did not alter the provision of art 1, § 20 that grants defendants "as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." (Citations and internal quotation marks omitted.)

Michigan has a two-tier appellate court system. The intermediate appellate court, the Michigan Court of Appeals, has jurisdiction of appeals of right from final judgments or final orders of the circuit courts[4] or the court of claims.[5] Other appeals, including criminal cases in which the conviction is based on a plea of guilty, are discretionary, by leave granted. MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(A), (B); App. 139a, 151a. All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301; App. 139a, 158a.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in the court rules. MCR 7.205. App. 149a. The Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. If an application is granted in a guilty plea appeal, counsel is appointed (MCL 770.3a(2)(c); App. 140a) and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3); App. 154a-155a.

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[4] The circuit court is the trial court of general jurisdiction, including jurisdiction over felonies and including appellate jurisdiction over lower courts. Mich Const 1963, art VI, §13; MCL 600.601. The District Courts have jurisdiction over misdemeanors, MCL 600.8311, and exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00. MCL 600.8301.

[5] The Court of Claims is a special court established to hear claims against the State. MCL 600.6419.

B. The Present Lawsuit

On March 2, 2000, a month before the statute's April 1 effective date, this lawsuit was filed by Respondents, three indigent criminal defendants and two criminal defense attorneys. The named defendants were three State court judges and the then Attorney General of Michigan, who was later dismissed by the District Court and is no longer a party.

Respondent Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion, MCL 750.110a, and was sentenced by Petitioner Kowalski to a term of 9 to 15 years imprisonment. Petitioner Kowalski denied Tesmer's request for appointed appellate counsel on September 7, 1999, before MCL 770.3a took effect. Tesmer appealed the denial of counsel to the Michigan Court of Appeals and his appeal was pending when the District Court complaint was filed. The Michigan Court of Appeals denied his delayed application for leave to appeal on March 28, 2001. He did not seek appeal to the Michigan Supreme Court.

Respondent Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder, MCL 750.91, and was sentenced by Petitioner Crane to a term of life imprisonment. Petitioner Crane denied Carter's request for appointed appellate counsel on May 12, 1999, before MCL 770.3a took effect. Carter did not appeal, although a delayed application would still have been timely when the District Court complaint was filed.

Respondent Schnell is an indigent who pleaded guilty in 1998 to a charge of operating a vehicle under the influence of liquor, third offense, MCL 257.625, 769.11, and was sentenced by Petitioner Heathscott to a term of 5 to 10 years imprisonment. Petitioner Heathscott denied Schnell's request

for appointed appellate counsel on September 21, 1998, before MCL 770.3a took effect. Schnell appealed to the Michigan Court of Appeals, which denied his application on April 1, 1999. Rehearing was denied on May 25, 1999, and Schnell did not appeal to the Michigan Supreme Court.

Respondent Attorneys Fitzgerald and Vogler alleged that they are on lists of attorneys qualified to take assignments as appointed appellate counsel and that each of them "earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions." They alleged that the practice of denying appointed appellate counsel to indigent defendants convicted by guilty pleas had adversely affected their incomes and that MCL 770.3a "will adversely affect" their incomes because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Complaint, paragraphs 33-36. Neither of them represented any of the indigent criminal defendant Respondents. They asserted third-party standing under the doctrine of *jus tertii* to assert the constitutional rights of future indigent criminal defendants.

The opinions of the District Court and Court of Appeals are described in detail in the "Opinions And Orders Below," *supra*, at 1-3. For purposes of this Petition, Petitioners challenge the holdings that Respondent Attorneys have third-party standing, that indigent criminal defendants convicted on guilty pleas have a constitutional right to appointed appellate counsel on discretionary first appeals, and that MCL 770.3a is unconstitutional.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal law.

The first question has not been addressed by this Court and presents a direct conflict between the decision below and a decision of the Michigan Supreme Court. The Court of Appeals declared a Michigan statute unconstitutional and held that indigent criminal defendants who are convicted on guilty pleas have a constitutional right to taxpayer-paid appointed counsel for discretionary first appeals. This Court has not addressed this precise issue, but the Court of Appeals' holding is in direct conflict with the holding of the Michigan Supreme Court in *People v Bulger*, *supra*, 462 Mich 495.

The second question is presented by the Court of Appeals' holding that attorneys, whose only personal stake is an alleged adverse effect on potential future income, have third-party standing to assert substantive constitutional claims on behalf of unknown potential future indigent criminal defendants, even when it is proper to abstain from deciding the claims of the defendants themselves. This is contrary to decisions of this Court, particularly *Warth v Seldin*, 422 US 490 (1976).

This Court should grant certiorari to resolve the conflict and answer these questions.

I. Whether an Indigent Criminal Defendant Convicted on a Guilty Plea Has a Constitutional Right to Appointed Appellate Counsel for a Discretionary First Appeal is an Important Federal Question That Has Not Been Decided by This Court, and the Court of Appeals Decision Directly Conflicts With a Decision of the Michigan Supreme Court.

There is no constitutional right to an appeal. *McKane v Durston*, 153 US 684 (1894). This Court has held that if a State grants a right to a first appeal, then it cannot deny appointed counsel to an indigent, *Douglas v California*, 372 US 353 (1963). It has also held that after an initial first appeal by right to an intermediate State court of appeals, the constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974).

But this Court has never addressed the question of the present case: whether the constitution requires appointed counsel in a discretionary first appeal for a criminal defendant convicted on a guilty plea. The Court of Appeals below recognized that this Court has never addressed the precise question presented in this case, App. 19a: "The [Supreme] Court has yet to address the situation the statute presents, that of a discretionary first appeal. . . . We are left to fill in this gap."

The Michigan Supreme Court and the Court of Appeals have now addressed that question and have given conflicting answers. In *People v Bulger, supra*, 462 Mich 495, the Michigan Supreme Court held that the Constitution does not require appointed counsel in these circumstances, and in the present case the Court of Appeals held that the Constitution does require appointed counsel.

In *Ross v Moffitt*, *supra*, 417 US at 612, 616 this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. The State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of his indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal. The question is not one of absolutes, but one of degrees.
>
> * * *
>
> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. (Citations and internal quotation marks omitted.)

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary. Because this distinction is based on legitimate and permissible differences between trials and guilty pleas the Michigan appellate system is "free of unreasoned

distinctions." Furthermore, because of protections built into the guilty plea system, indigent guilty-pleading defendants "have an adequate opportunity to present their claims fairly" and receive a "meaningful appeal" without appointed appellate counsel.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Pleas.

Convictions based on guilty pleas are advantageous to both defendants and the State, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court discussed the *Brady* trilogy of guilty plea cases (*Brady*, *McMann v Richardson*, 397 US 759 (1970), and *Parker v North Carolina*, 397 US 790 (1970)) and recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302; App 146a-149a. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that

he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (Mich 2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). The court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6); App. 147a.

In *People v Bulger, supra*, 462 Mich at 517, where the Michigan Supreme Court upheld the constitutionality of the practice of denying counsel in discretionary first appeals from guilty pleas, the Court quoted from *Tollett v Henderson*, noted the State's "fundamental interest in the finality of guilty pleas," *Hill v Lockhart*, 474 US 52, 58 (1985), and then listed many rights that a guilty-pleading defendant gives up:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. See 1A Gillespie, Michigan Criminal Law and Procedure (2d ed), § 16:30, pp 94-104 (discussing the effect of a plea on the availability of various appellate claims). n7 These are all reasoned distinctions that are relevant to determining whether Michigan

> provides "meaningful access" to the appellate courts.
>
> ----------Footnotes----------
>
> n7 By pleading guilty or nolo contendere, a defendant waives the following issues: search and seizure claims, defective complaint and warrant claims, claims of error as to the preliminary examination (including sufficiency of the proofs to bind over), Fifth Amendment claims, nonjurisdictional evidentiary issues, challenges to operating a vehicle while under influence of alcohol predicate offenses, claims (including constitutional claims) relating to the defendant's factual guilt and the prosecution's ability to prove the case, claims of error in juvenile waiver proceedings, speedy trial claims (if the plea is unconditional), claims of violation of the statutory 180-day rule, claims of speedy trial under MCL 768.1; MSA 28.1024, claims of failure to timely file the habitual [offender] information, statute of limitations claims, unpreserved entrapment claims, double jeopardy claims that are unpreserved so that the necessary facts to support the claim are missing, and ineffective assistance of counsel claims in which the underlying issues are waived by a guilty plea. Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed), § 10:50, pp 10-15 to 10-17.
>
> ----------End Footnotes----------

Michigan's prohibition against the appointment of appellate attorneys for indigent defendants is not absolute and many issues not waived by the plea will fall within one of the exceptions. MCL 770.3a(2); App. 140a. The statute provides that appellate counsel shall be appointed whenever a defendant seeks leave to appeal a conditional plea. A conditional plea is

allowed by MCR 6.301(C)(2) and preserves for appeal pretrial rulings specified by the defendant at the time of the plea. The statute also provides that an attorney must be appointed if the prosecutor initiates an appeal, if the defendant's application for leave to appeal is granted, and if the trial court exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the appeals differently. The Court of Appeals made little attempt to evaluate these distinctions, merely noting that guilty pleas are not "infallible." This is an improper basis on which to base a determination of unconstitutionality. *Smith v Robbins*, 528 US 259, 277, fn 8 (2000)("Of course, no procedure can eliminate all risk of error."). Instead of relying on the Michigan Supreme Court's statement of issues that are waived by a guilty plea, the Court of Appeals incorrectly relied upon the dissenting opinion in *Bulger* for the proposition that some "legally complex" issues can still be appealed. App. 27a. This too is not a sufficient basis to hold the statute unconstitutional. *Ross v Moffitt, supra*, 417 US at 616:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

B. Defendants Who Plead Guilty Have an Adequate Opportunity to Present Their Claims Fairly and Receive A Meaningful Appeal.

In reaching the conclusion that a defendant is not entitled to appointed counsel in a discretionary appeal to the State Supreme Court after an appeal of right to the State intermediate appellate court, this Court in *Ross v Moffitt, supra*, 417 US at 615, noted the nature of the materials the defendant would typically have available:

> At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

In discretionary first appeals from guilty plea convictions in Michigan, unless there has been an interlocutory appeal the defendant does not have an appellate brief written by a lawyer or an appellate opinion. However, the defendant will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal.

It is the responsibility of appointed trial counsel to file appropriate interlocutory appeals and to respond to any preconviction appeals by the prosecutor. MCR 6.005(H)(2)-(3); App. 143a-144a. As noted by the Michigan Supreme

Court in *Bulger*, 462 Mich at 518-519, Michigan law requires that to preserve an issue for appeal, the defendant must move to withdraw the plea before the trial court, and trial counsel is required to file such motions: "Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation." Furthermore, it is the responsibility of trial counsel to file any appropriate postconviction motions. Motions filed in Michigan courts must be in writing and be accompanied by a brief. MCR 2.119(A). While MCR 2.119 is a civil rule, it nevertheless applies in criminal proceedings. See MCR 6.001(D). An indigent defendant is entitled to free copies of court documents, including transcripts. MCR 6.433. The District Court also noted that Respondents Tesmer and Schnell both had the benefit of a detailed 38-page appellate brief--obviously prepared by an attorney and circulated to "many indigent defendants"--addressing the constitutionality of the practice of denying appointed appellate counsel. App. 105a.

Thus, an indigent defendant who has entered a plea and wishes to appeal will not approach the Michigan Court of Appeals empty-handed. He will have a transcript; a motion and brief filed by a lawyer in the trial court that identifies the alleged legal issues and outlines the applicable law; and he will have the trial court's opinion regarding that motion, either in writing or in a transcript of an oral opinion. An indigent appellant will therefore be in a position similar to that of the indigent appellant in *Ross v Moffitt, supra.* He will have a transcript, a brief, and a court opinion upon which he can base any appeal. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office (App. 157a) as required by the statute, permit appellants without counsel to present their claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615.

Contrary to the express language of these court rules and statements by the Michigan Supreme Court, the Court of Appeals below erroneously relied on statements by Respondents and disparaged these requirements. App. 27a.

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process still provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois,* 351 US 12, 20 (1956)(plurality opinion holding unconstitutional a State requirement that indigents pay a fee for a transcript necessary to appeal). A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin,* 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, 528 US 259, 276 (2000)("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'"-(citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution. This Court should grant certiorari and reverse the Court of Appeals.

II. Whether Attorneys Have Third-Party Standing To Make A Constitutional Challenge To A State Statute Prohibiting Appointment Of Appellate Counsel For Indigents In Discretionary First Appeals Following Guilty Plea Convictions Is An Important Federal Question That The Court Of Appeals Decided In A Way That Is Contrary To This Court's Decisions

The Court of Appeals below should not even have considered the constitutionality of MCL 770.3a because none of the Respondents are proper parties to bring the challenge. Relying on *Younger v Harris*, 401 US 37 (1971), the Court of Appeals correctly concluded that "the district court should have abstained from hearing the claims of all three indigent plaintiffs" because ongoing proceedings in Michigan State courts gave the indigent Respondents adequate opportunity to bring their constitutional claims. App. 6a-10a. Nevertheless, and despite the fact that the Respondent Attorneys did not represent any of the named indigent Respondents, the Court of Appeals incorrectly granted third-party standing to the Attorneys to assert the rights of potential future indigent defendants. App. 10a-19a.

Four Judges dissented, App. 35a:

> Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

A. Respondent Attorneys Have, At Most, Standing to Bring Only their Own Claims.

In *Warth v Seldin*, 422 US 490 (1976), this Court considered the standing of various groups of petitioners to challenge a zoning ordinance that allegedly excluded low-income persons, and described constitutional and prudential limitations on the doctrine of standing, 422 US at 499:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper--and properly limited--role of the courts in a democratic society. (Citation omitted.)

Because the standing issue was raised in a motion to dismiss, the Attorneys' claim that the statute will adversely affect their incomes must be taken as true, *Warth v Seldin*, 422 US at 501. Even so, those claims are speculative, uncertain, and merely allege an indirect potential consequence of the statute. They are not sufficient to allege "'such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth*, 422 US at 498-499, quoting *Baker v Carr*, 369 US 186, 204 (1962).

Respondent Attorneys' claim is simply that they are on rosters of attorneys who on occasion receive court appointments to represent criminal appellants and that there may be fewer of those appointments in the future. They do not allege that they have any contractual or other right to any

specific number of appointments. The Respondent Attorneys have failed to "allege specific, concrete facts demonstrating that the challenged practices harm [them], and that [they] personally would benefit in a tangible way from the court's intervention." *Warth*, 422 US at 507. They do not allege any violation of any "personal right under the constitution," *Warth* 422 US at 509; nor could they, because attorneys have no constitutional right to receive court appointments to represent indigents on appeal.

B. Respondent Attorneys Do Not Have Third-Party Standing because they have not suffered sufficient injury in fact, they do not have a sufficiently close relation to future indigent defendants, and there are no significant obstacles to the future defendants bringing their own claims.

Even if the claims of the Respondent Attorneys were arguably sufficient to establish a "case or controversy" under US Const, Art III to assert their own rights, they are not sufficient to permit the Attorneys to assert the rights of others. *Warth*, 422 US at 499 (1976), noted this prudential limitation on the exercise of judicial power: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

In *Powers v Ohio*, 499 US 400, 410-411 (1991) this Court held that a white defendant was entitled to challenge the composition of his jury, from which black persons had been excluded, and described the circumstances in which the general prohibition against permitting a litigant to raise claims of third parties can be overcome:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests. (Citations omitted.)

The Court of Appeals below said that the Respondent Attorneys had suffered an injury in fact because they "stand to lose income if the challenged statute remains if force," they had a close relation to indigent defendants, and "significant obstacles of indigency and procedural processes challenge the indigents in contesting the statue." App. 11a-12a, 19a. The Court was wrong on all three factors.

As noted, the allegation that the Attorneys might lose potential income if they receive fewer appellate appointments in the future as a result of the statute is not sufficient to confer standing on them, so they have not suffered an "injury in fact," and do not have a "sufficiently concrete interest" in the outcome of the issue in dispute. They do not have any constitutional rights at stake.

Nor do the Respondent Attorneys have a sufficiently "close relation" to as-yet-unknown future potential clients. In *Caplin & Drysdale, Chartered v United States*, 491 US 617 (1989) a law firm was given third-party standing to challenge a drug forfeiture statute on behalf of its existing client because it had a $170,000 stake in the outcome of the question and in *United States Department of Labor v Triplett*, 494 US 715 (1990) an attorney was permitted to litigate the constitutionality of attorney limitations on behalf of his existing clients because the provision was enforced against the attorney directly and

affected a relationship to which the client was constitutionally entitled. The relation of Respondent Attorneys to future potential clients is far more ephemeral, however, and is more akin to the situation in *Warth v Seldin, supra*, 422 US at 509-510 (taxpayers of one jurisdiction held not entitled to challenge another jurisdiction's zoning ordinance because they were not subject to it and there was no relationship existing between them and others whose rights were assertedly violated). Mere "incidental congruity of interest" is insufficient to permit third-party standing. *Warth*, 422 US at 510.

Finally, in the present case there is no "hindrance to the [future indigent defendants'] ability to protect [their] own interests." The Court of Appeals' conclusion that indigent defendants face "significant obstacles of indigency and procedural processes" is based on circular, self-fulfilling reasoning and on that Court's belief that indigent defendants would not succeed in their own challenges. App. 12a-19a.

The Court of Appeals' statements that "almost every layperson would need the help of counsel to present an appeal" and "an indigent would have difficulty pursuing the right counsel as a *pro se* plaintiff" (App. 13a) show that instead of properly determining standing it was prejudging the merits of the issue of entitlement to appointed counsel. This Court cautioned against such bootstrapping in *Warth*, 422 US at 500: "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." Ironically, although the Court of Appeals used this improper analysis in deciding the third-party standing issue, it correctly disavowed the same analysis when deciding whether to abstain from the indigent defendants' claims, App. 9a: "Whether [Respondent Carter] had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim."

Even if the Court of Appeals is correct that an indigent defendant would be unlikely to prevail in a direct appeal in the Michigan courts, in a 42 USC § 1983 lawsuit, or in a federal habeas corpus lawsuit, that fact has no bearing on the issue of whether there are barriers to presenting the claims.

The dissenting opinion below cogently noted that if the Court of Appeals is correct that these attorneys have third-party standing to assert the constitutional claims of unknown potential future clients, it is difficult to perceive a principled reason to deny standing in other situations like workers' compensation, Social Security, and tort reform, App. 45a-46a: "It would be a short step from the majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients."

In summary, the Respondent Attorneys have, at most, standing to assert only their own claims of loss of income, and those claims do not demonstrate any constitutional violation. This case presents none of the factors necessary to give them third-party standing to raise constitutional claims of unknown potential future indigent defendants. To the contrary, this is a case where the cautionary words of Justice Powell, writing for himself and three other Justices, concurring in part and dissenting in part in *Singleton v Wulff*, 428 US 106, 129 (1976) are particularly pertinent:

> It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services.

CONCLUSION

For these reasons, Petitioner State court judges ask this court to grant certiorari and reverse the judgment of the Court of Appeals that the Respondent Attorneys have third-party standing, that indigent criminal defendants convicted on guilty pleas have a constitutional right to appointed appellate counsel in a discretionary first appeal, and that MCL 770.3a violates the Constitution.

Respectfully submitted,

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Dated: September, 2003

APPENDIX

Table of Contents

Page

1. *Tesmer v Kowalski (on en banc rehearing)*, 333 F.3d 683 (6th Cir. 2003) Opinion and Judgment.....1a-62a

2. *Tesmer v Kowalski*, 295 F.3d 536 (6th Cir, 2002).....63a-84a

3. *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002).....85a-86a

4. *Tesmer v Granholm*, 114 F. Supp. 2d 603 (ED Mich, 2000).....87a-124a

5. *Tesmer v Kowalski*, 114 F. Supp. 2d 622 (ED Mich, 2000).....125a-136a

6. Constitutional Provisions, Statutes, and Court Rules Involved.....137a-159a

7. State Court Administrative Office (SCAO) form: "Application For Leave To Appeal After Sentencing On Plea Of Guilty Or Nolo Contendere"..... 160a-170a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 00-1824/1845

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER, Plaintiffs-Appellees,

v.

JENNIFER M. GRANHOLM, Attorney General, Defendant, JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants-Appellants (00-1824),

JUDGE DENNIS C. KOLENDA, Appellant (00-1845).

333 F.3d 683
December 11, 2002, Argued
June 17, 2003, Decided
June 17, 2003, Filed

JUDGES: Before: MARTIN, Chief Circuit Judge; BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges. MARTIN, C. J., delivered the opinion of the court, in which BOGGS, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. ROGERS, J., delivered a separate opinion concurring in part and dissenting in part, in which SILER, BATCHELDER, and GIBBONS, JJ., joined. NORRIS,

J., delivered a separate dissenting opinion, in which SILER, BATCHELDER, and GIBBONS, JJ., joined. **[*686]**

BOYCE F. MARTIN, JR., Chief Circuit Judge. In 1994, Michigan's voters passed an amendment to the Michigan constitution precluding criminal defendants who plead guilty, guilty but mentally ill, or nolo contendre from receiving an appeal of right. Rather, these defendants may appeal only by leave of the Michigan Court of Appeals. Several Michigan state judges began to deny appointed appellate counsel to indigent defendants who pled guilty or nolo contendre, a practice that the state legislature codified. Three indigent defendants who were denied appointed appellate counsel brought an action in the Eastern District of Michigan under *42 U.S.C. Section 1983*, alleging that the practice and the statute violated the *Due Process* and *Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution*. The group of plaintiffs also included two attorneys who accept appointments in criminal proceedings. The defendants in this action were three Michigan circuit court judges who had denied the indigent plaintiffs appointed appellate counsel and the state attorney general.

After a hearing on motions, the district court found that the plaintiff attorneys had third-party standing and that the court should abstain from hearing indigent Tesmer's claims. The court further declared the challenged statute and practice unconstitutional, but issued no separate judgment or decree. After defendant Judge Lynda Heathscott and non-party Judge Dennis Kolenda refused to appoint appellate counsel for non-party indigents, plaintiffs sought injunctive relief and class certification. The district court entered an injunction against Heathscott and Kolenda, denied certification of a class of judge-defendants, and bound all Michigan state judges to the injunction.

We dismissed an earlier appeal by defendants after their notice of appeal misidentified the March 31 opinion and order.

We denied the subsequent petition for rehearing on the ground that the district court's order was not a final judgment. The defendants again appealed after issuance of the injunction, and a panel of this court heard the appeal. A majority of judges of this court elected to rehear the appeal en banc. We now AFFIRM the district court in part and REVERSE in part, holding that *Younger* abstention applies to the indigents but that the attorney-plaintiffs have third-party standing. We agree that the statute and practice are unconstitutional, but we hold that the injunction was improper with respect to Judge Kolenda and all non-party Michigan state judges.

I. BACKGROUND

In 1994, Michigan voters amended the state constitution to eliminate appeals as of right for criminal defendants who plead guilty, guilty but mentally ill or nolo contendre. n1 **[*687]** Mich. Const. Art I, § 20. Such defendants must file petitions for appeal, and the Michigan Court of Appeals may grant leave to appeal after review of the petitions.

n1 For simplicity, we will refer only to guilty pleas, though our analysis will apply to pleas of guilty but mentally ill and nolo contendre, as contained in the statute.

Several state judges began to deny appointed appellate counsel to those indigents who pled guilty. Judges John F. Kowalski, William A. Crane, and Lynda Heathscott denied appointed appellate counsel to indigent plaintiffs John C. Tesmer, Charles Carter, and Alois Schnell after these plaintiffs pled guilty in criminal proceedings.

The practice was later codified by Michigan's legislature in 2000. The statute provides that those who plead guilty generally "shall not have appellate counsel appointed for review of the defendant's conviction or sentence." *Mich. Comp. Laws Ann. § 770.3a(1).*

The statute provides exceptions to this general prohibition. The court *must* appoint counsel to aid in review of the conviction or sentence when one of four situations occurs: 1) the prosecution seeks appeal, 2) the sentence exceeds the upper end of the guidelines range, 3) the defendant's petition for appeal is granted, or 4) the defendant has entered a conditional plea. *Mich. Comp. Laws. § 770.3a(2).*

The court also has the discretion to appoint counsel if three situations all occur related to sentencing: 1) the defendant alleges that the sentence was based on improper scoring of the offense or prior record, 2) the defendant objected to the scoring or preserved the matter for appeal, and 3) the sentence was an upward departure from the upper limit of the range that the defendant alleges should have been scored. *Mich. Comp. Laws Ann. § 770.3a(3).*

The effect of the statute is that most indigent defendants who plead guilty will be denied appointed counsel when applying for leave to appeal. Only very limited circumstances will require appointed counsel to help with a petition for appeal.

Together with two attorneys who accept appointments as criminal defense counsel, Arthur M. Fitzgerald and Michael D. Vogler, the indigents brought an action on March 20, 2000, against the three judges and the state attorney general in federal district court under *42 U.S.C. § 1983*. The state attorney general was later found to be an improper party and is not part of this appeal. The indigents alleged that both the statute and practice of denying appointed appellate counsel after guilty pleas violated their *Fourteenth Amendment* rights to Due Process and Equal Protection. The attorney-plaintiffs allege that the statute violated their rights by denying them the opportunity to represent indigents in seeking leave to appeal. The plaintiffs sought declaratory relief, as well as permanent and preliminary injunctions.

The district court on March 31, 2000, issued an order and opinion after a hearing, finding that the attorney-plaintiffs had third-party standing to represent the rights of indigents and that the indigents had standing. *Tesmer v. Granholm, 114 F. Supp. 2d 603 (E.D. Mich. 2000)*. The court decided to abstain from hearing Tesmer's claim because of a pending state court action involving Tesmer. The court ultimately granted declaratory relief, ruling that the statute and practice were both unconstitutional under the *Equal Protection* and *Due Process Clauses*. The court would not impose an injunction against the judges, reasoning that *Section 1983* forbids injunctive relief against judges for acts or **[*688]** omissions in their judicial capacity, unless they violated a declaratory decree or declaratory relief was unavailable.

The judges appealed on April 10, 2000, under a case numbered 00-1405. A panel of this court, however, dismissed the appeal on July 13. The judges had mistakenly based their appeal upon the issuance of a final decree, which we ruled was not actually a final judgment ripe for appeal.

Meanwhile, on May 9, after Judge Heathscott denied appellate counsel to a non-party indigent defendant and after non-party state Judge Kolenda had denied appointed appellate counsel in several cases, the plaintiffs moved for injunctive relief against those two judicial defendants. The district court enjoined Judges Heathscott and Kolenda from denying appointed counsel. *Tesmer v. Kowalski, 114 F. Supp. 2d 622, 629 (E.D. Mich. 2000)*. Expanding this injunction, however, the district court held that the earlier ruling that the statute and practice were unconstitutional bound all Michigan state judges. Though plaintiffs had requested certification of a class of judges similarly situated to the named defendants, the district court denied certification and simply expanded the reach of its injunction.

The three named judges in the initial suit and Judge Kolenda appealed from the June 30 order. A panel of this court

held that abstention barred review of any of the named indigents' claims and that the attorneys had third-party standing. It reversed the district court and held that the denial of appointed appellate counsel did not violate the United States Constitution.

We granted rehearing en banc. We agree with the district court that the attorney-plaintiffs have third-party standing but hold that none of the indigents' claims may be heard under abstention principles. We also uphold the district court in finding that denial of appointed appellate counsel following guilty pleas is unconstitutional. Finally, we hold that the district court could not enjoin Judge Kolenda or all Michigan state judges who were non-parties to the suit.

II. ANALYSIS

The judges argue that the district court should have abstained because ongoing proceedings in Michigan state courts gave the indigent plaintiffs adequate opportunity to bring their constitutional claims. They also urge us to hold that the attorney-plaintiffs did not have third-party standing.

Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, the Supreme Court advised federal courts to abstain from deciding a matter that would be properly before them but for the pendency of state criminal proceedings in the matter. *Id. at 43-45*. Such deference to state proceedings is essential to the doctrine of "Our Federalism." *Id. at 44*. In a companion case, the Court held that the rule in *Younger*, which applies to an action seeking injunctive relief, applies as well to prohibit an action seeking declaratory relief when a state criminal prosecution is pending. *Samuels v. Mackell, 401 U.S. 66, 73, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971)*.

We look at three factors to determine if *Younger* abstention is warranted: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding, (2) whether the proceedings implicate important state interests, and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Tindall v. Wayne County Friend of the Court, 269 F.3d 533, 538 (6th Cir. 2001)*; *see also Cooper v. Parrish,* **[*689]** *203 F.3d 937, 954 (6th Cir. 2000)*; *Zalman v. Armstrong, 802 F.2d 199, 201-02 (6th Cir. 1986)*. We review the district court decision regarding abstention de novo. *Tindall, 269 F.3d at 538.*

First, when determining if state court proceedings involving the plaintiffs are pending, we look to see if the state court proceeding was pending at the time the federal complaint was filed. *Zalman, 802 F.2d at 204*. It remains pending until a litigant has exhausted his state appellate remedies. *Huffman v. Pursue, Ltd., 420 U.S. 592, 609, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)*; *Foster v. Kassulke, 898 F.2d 1144, 1146 (6th Cir. 1990)*. Finally, if state habeas corpus relief is available, a claim may be considered pending in state court for the purpose of analyzing abstention. *Foster, 898 F.2d at 1146.*

The parties agree that abstention applies only to the indigent plaintiffs and not to the attorney-plaintiffs. Tesmer pled guilty to a home invasion charge, then requested appellate counsel to assist in preparing an application for leave to appeal, a request denied on September 7, 1999. The district court abstained from adjudicating Tesmer's claim because he was a party to a pending state court action, had an adequate opportunity to raise constitutional challenges in the state court proceeding, and no extraordinary circumstances justified interference in the state court proceedings. Appellees do not challenge this decision.

Carter is also party to a proceeding in state court, but the district court found abstention inappropriate as to him because

he lacked the opportunity to bring a constitutional challenge, the third factor.

Finally, the district court found that Schnell had no pending state action, as his application for leave to appeal and request for rehearing were denied. Under Michigan's procedural rules, Schnell had fifty-six days to file a delayed application for leave to appeal with the Michigan Supreme Court. The district court found that Schnell's state action was completed at the time the federal complaint was filed, so abstention was not warranted as to him.

We disagree. Our holding in *Foster* allows abstention where a litigant has abandoned pursuit of state court relief. *898 F.2d at 1146*. In *Foster*, the plaintiff filed a *Section 1983* complaint challenging both a Kentucky statute that limited the amount of compensation her appointed counsel could receive and the practice of not providing a trial transcript. *Id. at 1145*. When she filed her federal suit, her claims had been denied in state court. We said, however, that she could pursue claims on direct appeal and, if unsuccessful, could resort to state habeas relief. *Id. at 1146-47*. By seeking injunctive relief in a *Section 1983* action, she was attempting to obtain federal review of state procedures in a criminal case before the state court could decide them fully. *Id.* Similarly, in *Huffman*, the plaintiff chose not to appeal an adverse trial outcome and filed suit in federal court. *420 U.S. at 598*. The plaintiff argued that abstention should not apply because the state proceedings had ended. *Id. at 608*. The Court disagreed, stating that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* Schnell's failure to pursue his claim by filing a delayed application for leave to appeal in the Michigan Supreme Court or by filing a state habeas corpus action equates to a failure to exhaust state court remedies.

Thus, we conclude that each of the indigent plaintiffs had ongoing state court proceedings at the time the federal complaint in this action was filed. We turn next to the third

factor, whether plaintiffs had an **[*690]** adequate opportunity to raise constitutional claims in state court.

A federal plaintiff arguing that he had an inadequate opportunity to raise constitutional claims in state court "has the burden to show that state procedural law barred presentation of [its] claims." *Armco, Inc. v. USW, AFL-CIO, Local 169, 280 F.3d 669, 682 (6th Cir. 2002)* (alteration in original). If the plaintiff had an opportunity to present his federal claim in state court proceedings, a federal court should not exercise jurisdiction over the claim. *Moore v. Sims, 442 U.S. 415, 425, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)*. On the other hand, if authority clearly shows that state law barred the presentation of the constitutional claims in state court, abstention is not appropriate. *Id. at 425-26*; *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987)*.

We agree with the district court's finding that Tesmer had an adequate opportunity to present his federal claims in state court because he filed a "lawyerly brief" seeking a delayed application for leave to appeal. The district court found that Carter did not have an adequate opportunity because he had no attorney and no knowledge of law. We disagree, for if Tesmer could raise the claim, Carter could also present his claims. Whether he had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim. Furthermore, a state supreme court case that was ongoing during this appeal constituted an example of the opportunity to raise the constitutional issues in a state proceeding. *See People v. Bulger, 462 Mich. 495, 614 N.W.2d 103 (Mich. 2000), cert. denied, 531 U.S. 994 (2000)*. In that case, an indigent defendant appealed from the denial of his motion for appointed appellate counsel following a guilty plea for cocaine and marijuana possession. *Id. at 105-06*. During the pendency of *Bulger*, the statute in question here was enacted; thus, it did not apply to defendant Bulger. The Michigan

Supreme Court expressly stated that it was not considering the constitutionality of the statute. *Id. at 107*. After finding no authority, either state or federal, mandating appointment of counsel following a guilty plea and finding that indigents do have meaningful access to appeals, the court remanded to the trial court so that Bulger could pursue an application for leave to appeal his convictions. *Id. at 114-15*.

Our conclusion that the district court should have abstained does not foreclose any appeal by the indigents. Once state proceedings are concluded, a litigant may choose to pursue a constitutional claim in a federal forum, and the federal court may choose to exercise jurisdiction. *See Huffman, 420 U.S. at 606*. Finally, as the district court did with respect to Tesmer, we consider whether extraordinary circumstances would allow federal jurisdiction despite the strong case for abstention. We analyze the circumstances of all three indigent plaintiffs together, however, because of the similarity of their situations.

In *Younger* the Court stated that federal interference with state proceedings may be allowed where irreparable injury is "great and immediate;" where state law flagrantly and patently violates express constitutional prohibitions; or where parties make a showing of bad faith, harassment, or unusual circumstances that require equitable relief to remedy. *401 U.S. at 46, 53-54*. The district court concluded, as do we, that plaintiffs did not demonstrate any such extraordinary circumstances.

[*691] We conclude that the district court should have abstained from hearing the claims of all three indigent plaintiffs, and we reverse its decision that only Tesmer's claims warranted abstention.

Third-Party Standing

The state judges contend that the two attorney-plaintiffs do not have standing to raise the constitutional challenge to the

statute because they are asserting the rights of third parties and have not suffered an injury in fact. The attorney-plaintiffs alleged in their complaint that they receive income when they accept appointments as appellate counsel for criminal defendants and that the statute will reduce the number of cases in which they would receive such appointments, thus reducing the income they receive.

The district court found that the doctrine of *jus tertii,* or third-party standing, applies to the attorney-plaintiffs. We agree.

Ordinarily a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1976)*. The Court, however, has allowed the rule to be disregarded when plaintiffs meet certain requirements, articulating the requirements in *Powers v. Ohio, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991)*. In allowing a criminal defendant to bring suit on behalf of black citizens who had been struck from a jury, the Court permitted a litigant to bring suit on behalf of a third party if 1) the litigant has stated an injury in fact, 2) the litigant has a close relation to the third party, and 3) the third party's ability to assert his own interests is hindered. *Id. at 410-11*.

The Court's analysis in *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*, guides our conclusion. In *Singleton*, two physicians challenged restrictions on government funding for abortions performed on patients eligible for Medicaid. The Court found that the physicians had stated an injury when they alleged that they would receive payments from the state for performing these abortions if the relief they sought were granted. *428 U.S. at 113*. A plurality explained that the second condition is met when "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and when the litigant "is fully, or very nearly, as effective a proponent of the right as the

latter." *Id. at 114-15*. As to the third condition, the Court did not demand that asserting a right be impossible for a third party but that a "genuine obstacle" to assertion exist. *Id. at 116*. Then, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Id.*

Applying these tests to the facts before us, we agree with the district court's analysis of third-party standing. The attorney-plaintiffs, like the physicians in *Singleton*, stand to lose income if the challenged statute remains in force. This constitutes an actual injury. The relationship between indigent defendants who seek appointed appellate counsel and attorneys whose appellate representation is denied is a close one . Judge Rogers's dissent in this case questions neither the existence of actual injury nor the closeness of the relationship between indigent defendants and appellate counsel. Rather, he would deny standing to the attorney-plaintiffs based on the third prong of the *Powers* requirements, that of significant obstacles to bringing suit to enforce one's own rights.

[*692] In *Singleton*, the Court recognized that a suit brought by the women was not an impossibility; for example, the pregnant women could file suit under pseudonyms to protect privacy. *428 U.S. at 117*; *see also id. at 116 n.6* (discussing potential routes around obstacles in earlier third-party standing cases). The Court, however, reasoned that third-party standing is permissible even where a prospective litigant may be able to bring suit, because a genuine obstacle is all that is necessary satisfy the third prong of the *Powers* requirements. *Id. at 116*. Yet, the dissent seeks to stretch this third prong from a showing of a hindrance to asserting one's own rights to a requirement of impossibility, a stretch the Court disavowed in *Singleton*.

Federal courts have permitted third-party standing frequently in the context of racially suspect peremptory

challenges during jury selection, identifying as obstacles the procedural burdens prospective jurors face of having no chance to be heard at their exclusion or no real ability to obtain declaratory or injunctive relief at that time, as well as the practical burdens of economic costs and small financial gain. *See e.g. Powers, 499 U.S. at 410-11*; *United States v. Ovalle, 136 F.3d 1092, 1102 (6th Cir. 1998)*. Privacy and anonymity concerns have also been noted as hindrances to individuals enforcing their rights. *Singleton, 428 U.S. at 116*; *Pa. Psychiatric Soc. v. Green Spring Health Servs., Inc., 280 F.3d 278, 290 (3d Cir. 2002)* (discussing stigma that could deter mental health patients from pursuing litigation). While stigma is an unlikely hindrance to an indigent defendant asserting his right to counsel after pleading guilty, economic and procedural burdens are obstacles for convicted indigents.

An indigent seeking appointed counsel does not have the economic means to pursue a lawsuit to enforce his rights or appeal the denial of them. As the Court has noted, almost every layperson would need the help of counsel to present an appeal. *Evitts v. Lucey, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*. Indeed, in the similar state case upon which the dissent relies to show that an indigent was able to assert his rights, the indigent had appointed counsel. *Bulger, 614 N.W.2d at 105*. For reasons unstated, the Michigan Supreme Court, after electing not to assert superintending control over Bulger's appeal on the merits, granted Bulger time to move for appointed appellate counsel. *Id.* The Michigan Supreme Court ordered the trial court to appoint counsel to argue the motion for appointed appellate counsel; thus, appointed counsel for this issue represented Bulger throughout his unsuccessful attempt to obtain appointed appellate counsel. *Id.* The Michigan Supreme Court apparently recognized that an indigent would have difficulty pursuing the right to counsel as a *pro se* plaintiff. The dissent speculates that the indigents would have no difficulty obtaining a lawyer to represent them, primarily evidenced by its unsupported assumption that if the

attorney-plaintiffs have the wherewithal to bring suit as parties, they ought to be just as willing to represent the indigents.

An indigent defendant also faces procedural burdens, confronting a situation in which assertion of the right to counsel would be effectively precluded by events transpiring between his plea and the first time he could pursue the matter in federal court. Following a guilty plea, a defendant could move, as Bulger did, for appointment of counsel to prepare an application for leave to appeal. *See 614 N.W.2d at 105*. The defendant would lose in this proceeding, for Michigan will be bound by its precedent. The indigent would be unable to assert his right **[*693]** to appointed counsel in federal court because of, as the dissent correctly notes, abstention doctrines. Upon reaching the conclusion of his unassisted attempts to appeal on the merits, the indigent would then be unable to bring a constitutional challenge to lack of appointed counsel in federal court that would gain him relief in the form of appointed appellate counsel. As we recently held in *Dotson v. Wilkinson, 329 F.3d 463, 2003 U.S. App. LEXIS 9555 (2003)*, a prisoner could raise a *Section 1983* claim to vindicate due process rights if the suit "does not *necessarily* implicate the invalidity of his continued confinement." While *Dotson* involved parole procedures, we drew upon *Heck v. Humphrey, 512 U.S. 477, 487, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994)*, for its holding that in a *Section 1983* suit alleging unlawful investigation and arrest, Heck was actually testing the legality of his conviction despite seeking only damages. *Dotson, 2000 U.S. App. LEXIS 9555 at *8* (citing *Heck, 512 U.S. at 481-82*). Many courts would find that a *Section 1983* action alleging that denial of appointed appellate counsel violated rights would similarly be a test of the underlying conviction. In such a situation, the indigent would have to pursue a petition for habeas corpus, including a claim that the lack of appointed counsel prejudiced him, but only after exhausting state remedies. *See 28 U.S.C. § 2254(b), (c)*. Though an indigent could pursue a petition for habeas corpus on a ground such as involuntariness of his plea

and perhaps invalidate his conviction as a result, the likelihood he could ever obtain similar relief in a successful petition asserting his right to appointed appellate counsel is virtually impossible. Even respecting principles of comity and federalism, we find that an indigent defendant would likely be foreclosed from any meaningful challenge to the lack of appointed counsel to prepare an application for leave to appeal.

The Supreme Court has, on at least two occasions, held that attorneys have third-party standing to assert constitutional rights of clients when a right to representation by counsel was affected by government action. *United States v. Triplett, 494 U.S. 715, 720-21, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990); Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 623, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 - 624 n.3, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989)*. In *Triplett*, the Court found third-party standing where Department of Labor regulations imposed restrictions on attorney's fees in black lung benefit cases, allowing an attorney to invoke the rights of black lung claimants because the fee restriction deprived prospective clients of the right to obtain legal representation. *494 U.S. at 720*. The Court observed that it has found third-party standing when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship, to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Id.* Though this restriction was against the litigant, the Court did not limit its holding to this alignment of parties. *See id.* Here, the statute does not restrict the attorneys or the indigents, but takes away the indigents' entitlement to appointed counsel, effectively placing the restriction on the state by prohibiting it from providing counsel in certain cases.

In *Caplin & Drysdale*, the Court held that a law firm had third-party standing to challenge a criminal forfeiture statute that required its criminal client to relinquish all his assets,

leaving nothing for payment of legal fees. *491 U.S. at 624 n.3.* The law firm contested the constitutionality of the statute as infringing upon **[*694]** defendants' *Sixth Amendment* right to counsel of choice. *Id.* The dissent notes that the client in *Caplin & Drysdale* forfeited his property to obtain a plea agreement, and the plea-bargaining pressure to forgo the defense attorney's fee claims by relinquishing assets, according to the dissent, constitutes an obstacle of the type contemplated by *Powers*. The indigents here faced the plea-bargaining process, and part of that process is informing them of the state's prohibition on appointed appellate counsel as a consequence. If facing the choice of relinquishing assets to enter into a plea bargain or going to trial is an obstacle, then too is the similar choice of giving up appointed counsel as a result of a plea.

The dissent cites three cases in which courts refused to grant third-party standing to attorneys. In the first, *Conn v. Gabbert, 526 U.S. 286, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999)*, an attorney representing a witness in the well-known murder trial of the Menendez brothers was searched by police for a letter sent from one brother to his client. *Id. at 288.* At the same time, the witness was called to testify before the grand jury without the attorney present, because he was being searched. *Id. at 289.* The attorney brought suit under *Section 1983* to enforce his own right to practice law, and further argued the timing of the search interfered with his client's right to have him available for consultation. *Id. at 292.* The Court declined to address whether his client had such a right, declaring he had no standing to enforce it; however, the Court did not discuss any of the factors required to obtain standing in making its conclusion. *Id. at 292-93.*

Illustrating its point that attorneys should not have third-party standing to challenge any statute that could affect their livelihood, the dissent refers to *Alexander v. Whitman, 114 F.3d 1392, 1408-09 (3d Cir. 1997)*, for its holding that a law

firm had no standing to challenge a statute forbidding wrongful death actions on behalf of stillborn fetuses. The suit arose when Alexander had a stillborn child and wished to bring a wrongful death action against the hospital and medical personnel, but was barred by the statute. *Id. at 1396-97.* Alexander brought her own challenge, in which the attorneys asserted their claims. The Third Circuit stated it was unaware of a constitutional right allowing the attorneys to sue "under the circumstances involved here" and affirmed the district court's conclusion that the mother was best suited to challenge the statute. *Id. at 1409.* In questioning the law firm's challenge to the denial of standing, the court preceded that observation by commenting that "whatever loss" the lawyers would suffer "is reduced to such insignificance (if not absurdity) by Ms. Alexander's tragic loss." *Id. at 1410.* The Third Circuit did not apply the facts of the case to the requirements articulated in Supreme Court standing precedent, appearing to dismiss the third-party claim as a meaningless extreme.

The third case is *Lambert v. Turner, 525 F.2d 1101 (6th Cir. 1975)* (per curiam), in which we rejected third-party standing for a legal services attorney to bring suit on behalf of all legal services attorneys against a state juvenile court judge for an injunction to prohibit the judge from failing to enforce rights of indigents to counsel and from retaliating against defendants represented by legal services. *Id. at 1102.* Our affirmance of the district court's decision, however, rested partly upon the fact that the parties entered into a consent injunction, thus eliminating any case or controversy between the parties. *Id.* Furthermore, the suit had named not one juvenile involved in an active case before the **[*695]** judge and sought to vindicate the rights of "potential juvenile clients." *Id.*

The prohibition against third-party standing would, in Judge Rogers's view, apply strongly where legal service providers wish to require procedures that increase demand for

their services. The "paradigm case" he mentions, however, is a hypothetical situation the Court used to illustrate how, under the Administrative Procedure Act, *5 U.S.C. Section 702*, a party seeking judicial review of a federal agency action must establish that his injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the basis of his complaint." *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)*. In the Court's hypothetical, a legal transcription company would not be "adversely affected within the meaning" of a statute requiring an agency to conduct "on the record" hearings, because the statute was enacted to protect parties to the hearings. *Id.* The *Lujan* case involved not a constitutional right like access to counsel, but a complaint by an environmental group against the Department of the Interior and Bureau of Land Management for violations of environmental and public land management statutes in decisions to reclassify public lands or return them to public domain, thus opening the lands up to mining. *Id. at 879.* The example used happens to be a legal services provider, but bears little relation to the ultimate issue here, the ability of indigent criminal defendants to assert a constitutional right to counsel.

Inmate access to the legal system is an important right, one that has been recognized in cases enforcing the ability of prisoners to have access to law libraries and legal assistance. *See Lewis v. Casey, 518 U.S. 343, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)*; *Wilson v. Iowa, 636 F.2d 1166, 1167 (8th Cir. 1981)* (stating that inmates acting as "jailhouse lawyers" have standing to contest official action that prevents them from assisting fellow inmates). In *Lewis*, the Court wrote: "When any inmate . . . shows that an actionable claim of [challenge to sentences or conditions of confinement] which he desired to bring has been lost or rejected, or that presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided," that inmate can show the state did not furnish adequate access to law libraries or legal

assistance. *518 U.S. at 356.* In citing these cases, we point to the significance attached to the ability of inmates to pursue actionable claims, and reason that if pursuit of actionable claims is an important right of inmates, but a burden prevents such pursuit, then surely the burden qualifies as the type of hindrance significant enough to satisfy the third prong of the *Powers* test.

In their brief, the indigents and attorney-plaintiffs cite numerous cases to support their abstention argument in which federal district courts have rejected abstention where controlling state authority "makes submitting those same constitutional issues to a state forum futile." *W.P. v. Poritz, 931 F. Supp. 1187, 1195 (D.N.J. 1996)*; *see also McKinstry v. Genesee County Circuit Judges, 669 F. Supp. 801, 806-07 (E.D. Mich. 1987)*. While these district courts asserted jurisdiction by rejecting abstention, we believe the rationale behind their decision is pertinent to the third-party standing issue here. Asserting the constitutional issue here in Michigan's courts would appear to be a similarly futile exercise for the indigent, which does not decrease in difficulty once he or she exhausts state relief. We hold that significant obstacles of indigency and procedural processes challenge the indigents in contesting **[*696]** the statute, thus satisfying the third prong in analyzing third-party standing for the attorney-plaintiffs.

Constitutionality of the Statute

A defendant who pleads guilty in Michigan state court must now seek leave for appeal from the state court of appeals, rather than having an appeal of right, as we have in the federal system. Under most circumstances, the Michigan statute at issue operates to deny indigent defendants appointed counsel to assist in the preparation of petitions for appeal.

The United States Supreme Court has expanded the right to counsel to allow appointed appellate counsel in certain circumstances. The judge-appellants are correct in stating that

the Supreme Court has never held that a constitutional right to appointed counsel exists on all first appeals. The Court has yet to address the situation the statute presents, that of a discretionary first appeal. In addressing the issue of the right to appointed appellate counsel, the Court has ruled on first appeals as of right and second, discretionary appeals, but not the discretionary first appeal at issue here. We are left to fill in this gap.

In *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*, the Court held that a California rule of criminal procedure was unconstitutional. The California rule mandated appellate court review of the trial record to see whether appointment of appellate counsel would be helpful to the court or to the indigent defendant making the request. The Court, without stating that it was specifically relying on due process or equal protection, reasoned that defendants who could afford counsel would have the advantage of briefs and argument prepared and delivered by counsel. *Id. at 356*. On the other hand,

> unless the printed pages show that an injustice has been committed, [indigent defendants are] forced to go without a champion on appeal. Any real chance [indigent defendants] may have had of showing that [the] appeal has hidden merit is deprived . . .when the court decides on an ex parte examination of the record that the assistance of counsel is not required.

Id. (emphasis omitted) To the Supreme Court, this procedure constituted impermissible discrimination against indigent defendants. *Id.* The Supreme Court held that if the state elected to create a system of appeals, a right to counsel exists for first-tier appeals as of right. *Id.* The Supreme Court expressly declined to address denial of counsel to assist an indigent in

> preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike.

Id. at 356 (emphasis omitted).

The Michigan judges here emphasize both that *Douglas* is limited to first appeals of right and that the language in the *Douglas* opinion places abstract limits on the need for equality. "[A] state can, consistently with the *Fourteenth Amendment*, provide for differences [in appellate procedure] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id. at 356-57* (citations omitted). The Michigan judges argue that this language supports their position that due process and equal protection do not require **[*697]** appointed appellate counsel in the present situation.

The Supreme Court further explained in *Douglas*, however, that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id. at 357* (emphasis omitted). It described the differences between an appeal of right in which a defendant who can afford counsel retains a lawyer and one in which an indigent is unrepresented. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Id. at 358.*

Another case considering the right to appointed counsel on appeal is *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974)*. The judge-appellants assert that the holding in

Ross is controlling, as it addressed discretionary appeals. The criminal appellant in *Ross* was denied appointed counsel for a discretionary appeal to the North Carolina Supreme Court after the state court of appeals affirmed his trial conviction. *Id. at 603-04*. The Court held that the United States Constitution did not require appointment of counsel to assist in discretionary second-level appeals. *Id. at 610*.

Discussing its decision under a due process analysis, the Court reasoned that the role of an attorney is different in trial. There the attorney acts as a shield to protect a person presumed innocent. In appellate proceedings, the role is of "a sword to upset the prior determination of guilt." *Id. at 610-11*. The Court stated that the existence of an appeal process does not require a state to provide counsel in every stage to be fair but cannot single out indigents and deny them "meaningful access to the appellate system because of their poverty." *Id. at 611*.

The disparate treatment of indigents, stated the Court, is more appropriately discussed under an equal protection analysis. The requirements of equal protection do not require exact equality, but do require that the appellate system be "free of unreasoned distinctions" and "that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Id. at 611-12* (citations omitted). The Court held that the *Equal Protection Clause* would not require the state to appoint counsel for discretionary second level appeals. *Id. at 612*.

Much of the Court's position, however, stems from the fact that North Carolina allowed an appeal of *right* to the state supreme court in cases involving a sentence of death or life imprisonment and to the state court of appeals in all other criminal cases. *See id. at 613*. North Carolina authorized appointment of counsel for this first appeal of right. *Id. at 614*. Thus, in petitioning for a discretionary appeal in North Carolina, a defendant has already had his claims presented by a lawyer and rejected by an intermediate appellate court. *Id.* He

will then have materials such as trial transcripts, a brief on appeal, and often an appellate opinion. *Id at 614-15*. An appellate court weighing a discretionary petition for second appeal would have sufficient material to provide a basis for a decision to grant or deny an appeal. *Id. at 615*.

The Court also emphasized the purpose of the discretionary nature of the second appeal in *Ross*. The Court reasoned that higher appellate courts take cases of significant public interest, of major jurisprudential significance, or to resolve conflicts **[*698]** between their decisions and those of lower courts. *Id.* The higher appellate courts will have sufficient material to determine if this second-level, discretionary appeal is one they should consider and may deny the appeal even if the intermediate court erred, because the case does not fulfill a function they serve by reviewing significant cases. *Id. at 615*.

The dissent in *Ross* agreed with the Fourth Circuit's decision in the case, declaring that a right to appointed counsel attached in discretionary appeals. *Ross, 417 U.S. at 619* (Douglas, J., dissenting.) The Fourth Circuit had found "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." *Id.* (citation omitted). The dissent argued that the Fourth Circuit was correct in noting that an indigent defendant proceeding without counsel is at a substantial disadvantage compared to a wealthier defendant who may hire counsel "when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from [the United States Supreme] Court." *Id. at 620*.

We have once before held that states may not deny appointment of counsel to assist indigent defendants in preparing applications for discretionary direct appeal to the state's highest court. *Mitchell v. Johnson, 488 F.2d 349, 349 (6th Cir. 1973)*. Our decision was made before the Supreme Court ruled contrarily in *Ross v. Moffitt*. The reasoning, however, is instructive. There we looked at the Supreme

Court's decision in *Douglas v. California*, as well as two other Supreme Court cases dealing with rights of indigents to assistance on appeal. In the first, *Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956)*, the Supreme Court ruled that an appellate review procedure that in effect required defendants to have access to a trial transcript would comport with due process and equal protection only if indigents were provided with a free transcript. Four of the justices stated, *at 19*,

> To deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate [an] appellate review as defendants who have money enough to buy transcripts.

Similarly, the Court held in *Burns v. Ohio, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, 84 Ohio Law Abs. 570 (1959)*, that a state could not require an indigent to pay a filing fee as a condition to filing for leave to appeal to the state supreme court. The Court reasoned, *at 257*, that:

> Once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of the.. poverty. . . . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

These cases point to a concern that no one be precluded from pursuing the avenues of appeal simply because one cannot afford the pursuit. That rationale was stated in *Mitchell:*

> Defendants without education in the law or experience in its practice cannot be expected, unaided, to state accurately and clearly whatever claims for justice their cases might possess. . . . We think it not unreasonable to postulate **[*699]** that discretionary review will be denied indigents in a significant number of cases where wealthier appellants, with the assistance of counsel, would have obtained review and possibly a reversal of the conviction on the merits.

488 F.2d at 351. With only two significant Supreme Court cases that expressly address the right to appointed appellate counsel, the parties urge us to consider the right to such counsel as deduced from several habeas corpus cases that concern effective assistance of counsel. In *Evitts v. Lucey, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*, the Court held that defendants were entitled to effective assistance of counsel on a first appeal of right. "To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial--is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* The Court stressed that an appellate brief on the merits of the appeal, a trial transcript, and a lower court opinion are important in appellate cases.

In *Pennsylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987)*, a habeas corpus case that dealt with appointed counsel in the context of effective assistance, the Court reversed a Pennsylvania Superior Court's ruling that *Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967)*, controlled the conduct of appointed counsel in collateral post-conviction proceedings. *Finley, 481 U.S. at 554*. Though *Anders* was based on the underlying right to appointed counsel in the first appeal of right, the Court held it applied

only when the criminal defendant has established the right to counsel. *Finley, at 554.* In *Finley*, the criminal defendant *was* afforded appointed counsel in her first direct appeal, which happened to be as of right, *id. at 553*, but the Court determined she had no right to counsel in post-conviction proceedings and her appointed counsel need not have followed *Anders* when assisting with her collateral attack. *Id. at 558*. The judge-appellants urge us to consider this case to bolster their argument that appointed appellate counsel is required only in an appeal of right. We give little weight to their use of *Finley*, however, because it addresses the right to appointed appellate counsel only by repeating the principles stated in *Douglas* and *Ross*.

The Court found that the distinction between *Douglas* and *Ross* was significant in deciding *United States v. MacCollom, 426 U.S. 317, 324, 48 L. Ed. 2d 666, 96 S. Ct. 2086 (1975)* (plurality opinion), in which an indigent prisoner sought a free trial transcript to help him prepare a collateral attack under *28 U.S.C. § 2255*. The indigent had an opportunity for a direct appeal as of right. He failed to pursue it, which would have allowed him to receive the free trial transcript. *Id. at 325*. Thus he could not, years later, seek a free transcript for a collateral attack, which the Court characterized as "a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first instance . . . ." *Id. at 325-26*. MacCollom had already been given "an adequate opportunity to present his claims fairly . . . ," which is all *Ross* required. *Id. at 324* (quoting *Ross, 417 U.S. at 616*).

The indigents and attorney-appellees in the present appeal urge us to consider the Court's discussion in *Smith v. Robbins, 528 U.S. 259, 276-78, 145 L. Ed. 2d 756, 120 S. Ct. 746 (2000)*, of previous cases setting forth rights of indigents pursuing appellate review. *Smith* involved the constitutionality of a California procedure that allowed counsel to withdraw when faced with the possibility of pursuing a frivolous appeal.

Id. The Court reiterated that the **[*700]** guarantees of the *Equal Protection* and *Due Process Clauses* combine to require that a state's appellate process provides indigents adequate opportunity to present claims, but did not make a distinction between appeals of right and discretionary appeals. *Id.*

We cannot read into this discussion any mandate from the Court for states to provide appellate counsel in every instance. What we can take from the discussion is that appellate processes must be fair and may not be implemented in a manner that discriminates based on indigency. The judge-appellants argue that the manner in which the process for appeal has been implemented in Michigan does not discriminate based on income or deny fair opportunities to indigents.

The judge-appellants emphasize the distinction between convictions following trials and convictions based on pleas. The Court declared in *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)* (quoting *United States v. Timmreck, 441 U.S. 780, 784, 60 L. Ed. 2d 634, 99 S. Ct. 2085 (1979)*), that the state has a fundamental interest in the finality of the prosecution following entry of a plea. The Michigan judges argue that judges must follow statutory procedures to ensure that a defendant's rights are protected when he chooses to enter a plea and that he makes the plea knowingly, voluntarily, and truthfully. This is not an infallible procedure, though. An appellate court may find error, as we frequently find in appeals from guilty pleas in federal district courts. Under Michigan law, a plea of guilty or nolo contendre waives issues that could have been raised on appeal, such as search and seizure claims or *Fifth Amendment* claims. M.C.R. 6.311(C). A guilty plea does not foreclose a defendant from raising other issues, such as double jeopardy claims or jurisdictional claims. These issues, we note, are legally complex to a layperson. *Bulger, 614 N.W.2d at 138* (Cavanaugh, J., dissenting).

The argument that a guilty plea bars defendants from raising some issues and that the plea process protects rights also would not apply to defendants who hope to raise discrepancies in sentencing. While limited exceptions allow for the courts to appoint appellate counsel following a guilty plea, such as when courts have imposed sentences that exceed the upper limit of the guideline range, these exceptions are infrequent. Conditional pleas are not regularly entered, and a defendant who was sentenced within the limits for a mandatory minimum sentence will have no absolute right to appointed counsel to prepare an application to appeal.

Finally, the judge-appellants argue that indigents who plead guilty have an adequate opportunity to preserve issues for appeal and present challenges through post-conviction trial court motions that appointed trial attorneys file. The indigents and attorney-plaintiffs noted that these motions, however, are not the same as an appeal to the next highest court, but are usually of the type seeking withdrawal of appointed trial counsel, a new trial, or a rehearing.

Review of criminal procedures in other states indicates that few states require an application or petition for leave to appeal for the first appeal from a conviction, whether plea-based or verdict-based. *See Bundy v. Wilson, 815 F.2d 125, 136-142 (1st Cir. 1987)* (collecting all state statutes pertinent to right to appeal). Of the other states that mandate a petition or request for appeal from criminal proceedings, being New Hampshire, Virginia, and West Virginia, none regulate appointment of appellate counsel in the manner prescribed by **[*701]** Michigan law. n2

> n2 In New Hampshire, a defendant convicted of a class A misdemeanor has a right to appeal to the superior court from a conviction in municipal or district court. *N.H. Rev. Stat. Ann. § 599.1* The state supreme court may decline to accept an appeal from a lower court. N.H. R. of Ct. 7. The New Hampshire constitution guarantees

counsel to assist defendants who will have liberty deprived, N.H. Const. Pt. I, art. 15, but in cases where liberty is not at stake, neither trial counsel nor appellate counsel need be appointed. *State v. Westover, 140 N.H. 375, 666 A.2d 1344, 1347 (N.H. 1995).*

In Virginia, appeals to the court of appeals or supreme court are discretionary, except for appeals of capital convictions. *Dodson v. Dep't of Corrections, 233 Va. 303, 355 S.E.2d 573, 576 n.5, 3 Va. Law Rep. 2403 (Va. 1987). Virginia Code § 19.2-157* provides that an indigent is entitled to appointed appellate counsel. *Id. at 309, 355 S.E.2d at 577.*

In West Virginia, the state constitution establishes initial appeal by petition. *Billotti v. Dodrill, 183 W. Va. 48, 394 S.E.2d 32, 37-38 (W.Va. 1990).* The West Virginia Supreme Court determined that an indigent must be allowed appointed counsel to assist on appeal. *Id. at 39*; *Rhodes v. Leverette, 239 S.E.2d 136, 139 (W.Va. 1977).*

Michigan's statute creates unequal access even to the first part of the appellate system. Though the judge-appellants argue that any distinctions in Michigan's appellate system stem from the fact the indigent pleads guilty, or that the appeal is merely discretionary, the effect is to create a different opportunity for access to the appellate system based upon indigency. As applied, the statute violates the due process provision of the *Fourteenth Amendment to the United States Constitution*, and is thus unconstitutional.

Reach of the Injunction

After issuing its opinion in the first case, the district court then crafted an injunction that not only bound parties to the original action, but also parties in the second action, Judge Kolenda, and other non-parties.

On appeal, the standard of review for the grant of an injunction is abuse of discretion. *United States v. Miami Univ., 294 F.3d 797, 806 (6th Cir. 2002)*. "A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law." *Id.* (quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, 270 F.3d 298, 308 (6th Cir. 2001))*.

Under *Section 1983*, injunctive relief cannot be granted against a judicial officer "unless a declaratory decree was violated or declaratory relief was unavailable." Following the March 30, 2000, hearing, the district court issued an opinion declaring the statute and the practice unconstitutional.

Under the declaratory judgment statute, *28 U.S.C. § 2201(a)*, a court "may declare the rights and other legal relations of any interested party seeking such declaration." Declaratory judgment is effective as to only the plaintiffs who obtained it. *Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)*. When a class has not been certified, the only interests of concern are those of the named plaintiffs. *McKenzie v. Chicago, 118 F.3d 552, 555 (7th Cir. 1997)*. The Court of Appeals for the Seventh Circuit explained, "A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified." *Id.* The Court of Appeals for the Third Circuit has ruled that a declaratory judgment finding a state statute unconstitutional is binding only upon parties named in the action. *YWCA of Princeton v. Kugler, 463 F.2d 203, 204 (3rd Cir. 1972)*. We have already determined that abstention principles keep federal **[*702]** courts from ruling upon the cases of the indigent plaintiffs so only the attorneys would be protected by the declaration as named plaintiffs. A different attorney, neither Fitzgerald nor Vogler, seeking court appointment to handle a defendant's application for appeal, or a future indigent defendant, has not had his or her interests declared under the district court's order. Thus, under *Doran* and authority from

sister circuits, we hold that the declaration and injunction applies only insofar as it states the rights of the named attorney-plaintiffs.

The district court stated that it was exercising its authority to issue an injunction against the judges under *Federal Rule of Civil Procedure 65(d)*. The rule provides:

> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

To prevail on a motion for preliminary injunction, a plaintiff must show the following elements: 1) likelihood of success on the merits, 2) irreparable injury, 3) degree of harm an injunction would cause to others, and 4) that the public interest would be served. *Doran, 422 U.S. at 931*; *Local Union 1937 v. Norfolk S. Corp., 927 F.2d 900, 904 (6th Cir. 1991)*. To receive final injunctive relief, a plaintiff must prevail on the merits of the claim, show irreparable injury, and show that he has no adequate remedy at law, and the court must consider the effect on the public good. *Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*.

A lack of irreparable injury must end the court's inquiry. *Aluminum Workers Int'l Union v. Consol. Aluminum Corp., 696 F.2d 437, 444 (6th Cir. 1982)*. The record does not show whether the district court found irreparable injury, and the district court did not address it in either of its two opinions. The judge-appellants argue that none of the plaintiffs can show irreparable injury. They point out that the indigent criminal defendants were not subject to the statute, nor do they have

pending charges that will subject them to the statute. The attorneys are a different case. The judge-appellants allege that the attorneys will suffer only transitory harm by being denied appointments, and that no evidence shows the attorneys would even receive future appointments. The attorneys argue, however, that without injunctive relief it is entirely likely that this aspect of their practice, however small or large in volume, would be eliminated. The attorneys would be forced to challenge each denial of appointment.

Our deepest concern with the equitable relief fashioned by the district court is that it enjoins non-party judicial officers. During the June 30, 2000, hearing, the district court expressed concern with the propriety of enjoining all Michigan circuit court judges, and rightly so. We have often reiterated the principle that injunctive relief should be no broader than necessary to remedy the harm at issue. *See, e.g., Miami Univ., 294 F.3d at 816 (6th Cir. 2002).* In *Blackard v. Memphis Area Medical Center for Women, Inc., 262 F.3d 568 (6th Cir. 2001)*, we explained that *Federal Rule of Civil Procedure 65(d)* is based on the doctrine that "a decree of injunction not only binds the parties defendant but also those represented by them or subject to their control." *Id. at 574* **[*703]** (quoting *Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 89 L. Ed. 661, 65 S. Ct. 478 (1945)).*

To determine whether a person is in active concert or participation with an enjoined party, we look to the actual relationship between the two. *Id.* Control of a third party by the enjoined party is not a requirement for the third party to be bound. *Id.* The third party is bound "if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it or subject to its control." *Id.* In this case, the judges named in the original suit, who would be bound by an injunction issued for violating the decree, are not in control of or in privity with the other state judges, including Judge Kolenda. The only way in which these judges could

conceivably be identified in interest is that they all happen to be judges and have sworn to uphold Michigan law. We think this to be a far broader application of the concept of "active concert and participation" than permissible under the district court's authority.

Enjoining a judge is a serious matter. As we stated in *Panhandle Eastern Pipe Line Co. v. Thornton, 267 F.2d 459, 460 (6th Cir. 1959)* (citations omitted), an injunction against a judge is a "drastic and extraordinary remedy" that is "reserved for really extraordinary causes." As a sister circuit asked, in adopting the reasoning of a former dissenter: "When we embark on this new course, we must prepare to face this unpleasant question: If a state judge does not obey a district court's injunction, are we willing to jail the state judge for contempt?" *Pompey v. Broward County, 95 F.3d 1543, 1550 (11th Cir. 1996)* (quoting *Luckey v. Harris, 896 F.2d 479, 482 (11th Cir. 1989)* (Edmonson, J., dissenting)). In some circumstances, enjoining a judge is necessary to ensure full relief to the parties. *In re Justices of the Supreme Court, 695 F.2d 17, 23 (1st Cir. 1982).* For example, in *WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981),* we upheld a district court's injunction against a state judge who had issued an unconstitutional media suppression order.

Engaging in unconstitutional practices or following an unconstitutional statute are circumstances that may warrant injunctive relief. The injunctive relief cannot be unlimited, however, and must comport with established rules of civil procedure. Even the district court recognized that it was treading on uncertain ground, indicating that it was "mindful that the issue of whether an injunction can issue with respect to those judicial officers not parties to the prior declaratory decree is not clear cut." *114 F. Supp. 2d at 628.* After parsing the language of *Section 1983*, the court concluded that the specification of "a" declaratory decree, rather than expressly requiring one for each judicial officer, indicates a

congressional intent to allow one declaratory decree to apply to multiple enjoinees. *Id.* The court added that this interpretation promotes conservation of judicial resources by not requiring plaintiffs to file suit each time a judge acts contrarily to the decree.

The district court commented that the scarcity of cases addressing the issues set forth in the indigents' and attorney-plaintiffs' motion for an injunction suggests that the overwhelming majority of judges do abide by federal court orders that are designed to enforce the United States Constitution. *Id. at 629.* "Indeed, it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices of Supreme Court, 695 F.2d at 23.* Failure of a judge unnamed in a declaratory decree to abide by such declaration does not allow a district court to throw caution to the wind and summarily **[*704]** bind all judges. The court must still follow the statutes, rules, and case law governing the issuance of injunctions. We hold that with respect to Judge Kolenda, a non-party to the original suit, and to the unnamed and uncertified putative class of Michigan judges, the injunction cannot issue.

A further defect with the injunction is that no separate document was entered for the decree or injunction. *Rule 58 of the Federal Rules of Civil Procedure* requires that "every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in *Rule 79(a)*." *Federal Rule of Civil procedure 79(a)* governs the procedures the clerk must use when entering judgments. In *Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 55 L. Ed. 2d 357, 98 S. Ct. 1117, reh'g denied, 436 U.S. 915, 56 L. Ed. 2d 416, 98 S. Ct. 2259 (1978)*, the Supreme Court explained the existence of *Rule 58* as a necessity to provide a means to determine deadlines to appeal. Though the rule is to be applied mechanically to determine whether an appeal is

timely, it should not foreclose appellate jurisdiction and may be waived where district courts show intent that the opinion and order be the final judgment, judgment is entered in the docket, and parties do not object to the lack of a separate judgment. *Id. at 387.* We have held that the lack of a separate document under *Rule 58* divests us of jurisdiction to hear an appeal. *See, e.g., Communications Workers of Am. v. United Tel. Co., 491 F.2d 207 (6th Cir. 1974).* The outcome of these cases required remand to the district court for entry of a separate judgment, and then a new appeal. *See id.* Other circuits have held that the failure to enter a *Rule 58* judgment, if a district court's decision is unquestionably final, does not prohibit appellate review. *See e.g. Kunkel v. Cont'l Cas. Co., 866 F.2d 1269, 1272 n.3 (10th Cir. 1989)* (citations omitted). We agree with the view of the Supreme Court and other circuits and hold that remand to the district court, after we have heard the merits of the case twice, would contravene judicial economy and require duplicative litigation. Therefore, we simply REVERSE the issuance of the injunction against Judge Kolenda and all Michigan judges who were not parties to the original suit.

III. CONCLUSION

In conclusion, we AFFIRM the district court's ruling that it must abstain from hearing Tesmer's claims, that the attorneys have third-party-standing, and that the Michigan statute is unconstitutional. We REVERSE the district court's ruling that it may hear the claims of Schnell and Carter, and that it may issue an injunction against Judge Kolenda and non-party Michigan judges.

ROGERS, Circuit Judge, concurring in part and dissenting in part. With great respect, I feel bound to dissent on the ground that the lawyer plaintiffs in this case lack standing. I concur in that portion of the majority opinion holding that under the principles of *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, and its progeny, the district

court was required to abstain with respect to the claims brought by the state criminal defendants. Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. **[*705]** Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

I. The General Prudential Rule Against Third-Party Standing

Numerous Supreme Court holdings support the unexceptional conclusion that a litigant must assert his legal rights or interests and cannot rely on the legal rights or interests of others not party to the proceedings. In *Warth v. Seldin*, for instance, the Court stated the general rule that

> even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations closely related to Art. III concerns but essentially matters of judicial self-governance the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

422 U.S. 490, 499-500, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (citations omitted); *see also Powers v. Ohio, 499 U.S. 400, 410, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991)*; *United States*

Dep't. of Labor v. Triplett, 494 U.S. 715, 720, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990); *Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)*; *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 474, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)*; *Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)*; *Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)*.

The *Warth* case involved a challenge to ordinance provisions of the township of Penfield that allegedly kept low-income persons from moving to Penfield, contrary to the requirements of the *Fourteenth Amendment*. *Warth, 422 U.S. at 493*. Several classes of plaintiffs failed to show sufficiently that they would benefit from winning the suit, and thus lacked *Article III* standing. *Id. at 502-08, 514-17*. Two classes of plaintiffs, however, were held to lack standing even though they could or might be able to show *Article III* injury. Taxpayers of nearby Rochester claimed that their tax burden would be increased by Penfield's refusal to share in the housing of poor people, and thus had *Article III* standing. *422 U.S. at 508-09*. The Court nonetheless found they lacked prudential standing since the *Fourteenth Amendment* basis for the Rochester taxpayers' suit, assuming the claim had validity, protected poor people who wanted to live in Penfield, but not taxpayers of neighboring jurisdictions. *Id. at 509-10*. Since the legal foundation of the lawsuit did not protect the interests of the Rochester taxpayers, those taxpayers lacked standing. *Id.*

A second class of *Warth* plaintiffs, current residents of Penfield, also had a potentially sufficient interest to meet *Article III* standing requirements--the interest in living in a diverse community. *422 U.S. at 512, 514*. But these plaintiffs lacked prudential standing because, again, the basis for the lawsuit--the *14th Amendment*--did not protect such an interest. *Id. at 514*. The Court contrasted **[*706]** the situation

presented in *Warth* with cases that arose under Civil Rights statutes that did protect such interests. *Id.*

The *Warth* holdings reflect a long-recognized principle. In *Tileston v. Ullman, 318 U.S. 44, 87 L. Ed. 603, 63 S. Ct. 493 (1943)*, the Supreme Court held that doctor plaintiffs lacked standing to challenge a Connecticut statute forbidding their counseling the use of contraceptives, where the sole interest asserted was the patients' right to life under the *Fourteenth Amendment. Id. at 46.* It should be noted that the Supreme Court in its analysis did not purport to engage in a balancing of interests. Instead, it relied upon a general rule that plaintiffs must litigate their own interests, and that they lack standing to litigate the interests of others. *Id.*

Warth's holding with respect to third party standing is still good law, and was applied recently by the Supreme Court to a case involving a lawyer seeking as a party to litigate his client's interest. *Conn v. Gabbert, 526 U.S. 286, 143 L. Ed. 2d 399, 119 S. Ct. 1292 (1999).* In *Conn*, the Court rejected third party standing for an attorney who brought suit in his own right against a prosecutor for actions that interfered with the asserted right of his client, a grand jury witness, to have her lawyer available for consultation outside the grand jury room. *526 U.S. at 292-93.*

The third party standing prohibition would appear to apply most strongly where a provider of legal services seeks to require procedures that will increase the demand for the provider's services. Thus in the context of judicial review of administrative action (where prudential standing rules are, if anything, more loosely applied n1), the Supreme Court has used *as a paradigm case* the example of a transcript preparer who would lack standing to challenge an agency's refusal to require its hearings to be on the record as required by statute. *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); see also NCUA v. First Nat'l &*

Trust Co., 522 U.S. 479, 498, 140 L. Ed. 2d 1, 118 S. Ct. 927 (1998).

> n1 Although the present appeal is not an *Administrative Procedure Act (APA)* case, because there is no federal administrative action being reviewed, any indication in an APA case that prudential standing requirements are *not met* would apply *a fortiori* to standing outside of the APA context. This is because the Supreme Court has held (however mysteriously as a matter of textual analysis) that the APA expanded the class of "aggrieved" persons entitled to judicial review. *Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970). See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* ("We have long since rejected [the] interpretation . . . which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather we have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint.").

Plaintiff lawyers in this case are injured by a state rule that, if unconstitutional, is unconstitutional because it infringes on the interests of their unnamed future clients. Application of the general rule requires the conclusion that they lack standing. Moreover, the policies of the general rule apply squarely. Permitting the lawyers to sue would permit the federal courts to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary **[*707]** to protect individual rights." *Warth, 422 U.S. at 500.*

Congress may of course lift the prudential rule, permitting categories of persons with *Article III* standing to litigate the interests of others. *See, e.g., Bennett v. Spear, 520 U.S. 154, 162-66, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997)*; *FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77, 84 L. Ed. 869, 60 S. Ct. 693 (1940)*. No such statutory lifting of prudential standing requirements has been asserted in this case.

II. Exceptions to the General Rule

To be sure, the Court has found exceptions to the prudential rule. First, where an enforcement action is brought directly against a defendant under a law or practice that the defendant argues is an invalid infringement of someone else's rights, the Court has engaged in a balancing determination to determine whether third-party standing should be permitted. In rejecting third-party standing for the Rochester taxpayers in *Warth*, the Supreme Court explicitly distinguished this category of cases:

> In several cases, this Court has allowed standing to litigate the rights of third parties when *enforcement of the challenged restriction against the litigant* would result indirectly in the violation of third parties' rights. *See, e.g., Doe v. Bolton, 410 U.S. 179, 188, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*; *Griswold v. Connecticut, 381 U.S. 479, 481, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)*; *Barrows v. Jackson, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)*. But the taxpayer-petitioners are not themselves subject to Penfield's zoning practices.

422 U.S. at 510 (emphasis added). This exception explains several of the cases relied upon by the majority to support third-party standing in this case, including *Powers v. Ohio, supra. Powers* involved a criminal defendant challenging *his conviction* by asserting the rights of a third party. *499 U.S. at*

410. See also Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) (same); *Caplin & Drysdale v. United States, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (989)* (criminal forfeiture of assets claimed by plaintiff lawyers); *Dep't of Labor v. Triplett, 494 U.S. 715, 108 L. Ed. 2d 701, 110 S. Ct. 1428* (state disciplinary action against lawyer for accepting legal fees not permitted by federal regulation). n2 Similarly, where a plaintiff **[*708]** sues to enjoin such enforcement by criminal or regulatory authorities *against the plaintiff*, the court is more likely to find third-party standing. *See, e.g., Craig v. Boren, 429 U.S. 190, 192-97, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)* (vendor's challenge to enforcement of statutory prohibition *against vendor* of sale of 3.2% beer to males between 18 and 21 years of age); *Doe v. Bolton, 410 U.S. 179, 188, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*. n3

n2 *Triplett*, relied upon by plaintiffs to support third-party standing in this case, is not only distinguishable because it was a direct enforcement against the party invoking the rights of others, but also because it involved United States Supreme Court direct review of a state high court judgment (in that case West Virginia). While the Supreme Court did not go so far as to hold that third-party standing limits are totally irrelevant in that context, *see 494 U.S. at 721* n. **, it is nonetheless apparent that standing requirements may be less strictly enforced when the Supreme Court is reviewing a state court case than when it is ruling on standing in the lower federal courts. "Federal justiciability requirements, whether dictated by *Article III* or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and its special role and are therefore irrelevant to the question of what more generous justiciability rules a state may adopt if it chooses to do so." 1 Laurence Tribe, American Constitutional Law 320-21 (3d ed.

2000) (footnotes omitted). A leading constitutional law casebook states:

> Standing, mootness, and ripeness rules apply both to constitutional litigation arising in the federal courts, and to Supreme Court review of constitutional decisions of state courts. The rules are sometimes different, however, depending on whether the Supreme Court is reviewing a state or federal court decision. One traditional explanation for the difference is that case or controversy limitations represent, in part, rules of self-limitation for the federal courts and as such are irrelevant to Supreme Court review of state decisions.

William Cohen & Jonathan Varat, Constitutional Law 110 (10th ed. 1997). It follows that a expansive holding regarding prudential standing on review of a state high court, as in *Triplett*, does not necessarily control cases brought in the lower federal courts.

n3 Another case relied upon by the majority in this case, *Singleton v. Wulff, 428 U.S. 106, 113-18, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*, does not require an expansion of this exception. *Singleton* involved a challenge to Medicaid rules that limited reimbursement for the performance of abortions. A plurality of four Justices upheld third-party standing on the part of the doctor-plaintiffs challenging the Medicaid rules, and the opinion is arguably inconsistent with limiting third-party standing to direct enforcement situations. *428 U.S. at 113-18*. Four Justices dissented vigorously in that case, however, on just that ground. *Id. at 127-31* (Powell, J., dissenting). Justice Stevens' fifth vote was based on his finding that the doctors were litigating their own constitutional rights, and thus Justice Stevens took no

position on the direct-vs.-indirect criterion for third-party standing in the presence of such a finding. *Id. at 121-22. Singleton* is thus not controlling on that issue, and the Supreme Court's reliance on the distinction in *Warth* remains good law.

Second, when litigation already has a plaintiff with standing, the presence of other injured parties does not undermine the purposes of the limitation on third-party standing, and has sometimes been allowed. In *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977)*, for example, the Court reasoned that when there was at least one individual plaintiff who demonstrated standing to assert his own rights, it was unnecessary for the Court to decide if the circumstances justified departure from the general prudential rule against third-party standing and proceeded to the merits of the case. *Id. at 263-64. See also Doe v. Bolton, 410 U.S. at 188.*

Finally, the Supreme Court has explicitly found third-party standing requirements to be more liberally applied in *First Amendment* cases. *See, e.g., Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)* n4; *L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 38, 145 L. Ed. 2d 451, 120 S. Ct. 483 (1999)*; *Eisenstadt, 405 U.S. at 445 n.5*; *Thornhill v. Alabama, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 60 S. Ct. 736 (1940)*. This relaxation of the rules of standing is the result of a concern that the application of those rules could have an "intolerable, inhibitory effect on the freedom of speech." *Eisenstadt, 405 U.S. at 445 n.5*. Relaxation of third-party standing requirements when the statute involved could suppress constitutionally protected speech is thus the logical extension of *First Amendment* overbreadth doctrine. *See Gooding v. Wilson, 405 U.S. 518, 520-21, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).*

n4 The *Joseph H. Munson Co.* case, relied upon by plaintiffs to support lawyer standing in this case, is thus distinguishable as a *First Amendment* case. The case is also distinguishable as one that arose in state rather than federal court. See *n. 2, supra*.

This case involves none of special circumstances that allow for exceptions to the general prudential rule against third-party standing. First, this is not a case where **[*709]** the lawyers are being prosecuted, or even a case in which they assert the right to do something without being prosecuted or disciplined. Second, this is not a case where there is already a party who seeks to vindicate his own interest, thus obviating the need to determine if third-party standing exists. Indeed, the majority holds that the district court should properly have refrained from hearing the claims of the state criminal defendants whose legal rights and interests are directly involved in this case, as a matter of federal deference to state processes. Finally, this is not a case in which the freedom of speech might be chilled by application of the third-party standing requirements.

Outside of these contexts, the Supreme Court has been firm in not permitting litigants to sue in federal court to vindicate the rights of others. *See Warth, supra*; *Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 530, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991)*. These cases have refrained from recognizing standing even where the plaintiffs' claimed injury was in not being able to profit from contracts with persons whose rights were protected by the law relied upon by the plaintiffs. Thus in *Air Courier Conference*, postal employee unions challenged a U.S. Postal Service regulation permitting private couriers to employ overnight delivery of letters to foreign countries as an exception to the statutes that generally provide for a Postal Service monopoly. The Supreme Court held that the postal monopoly statutes were not passed to protect postal employees or their unions, and that the unions accordingly lacked prudential standing. n5 *498 U.S. at 524-29*.

The Court reached this conclusion despite the clear contractual relationship between the unions and the Postal Service, as reflected in the labor-management provisions of the Postal Reorganization Act, provisions that the union plaintiffs relied upon to assert prudential standing. The Supreme Court rejected the argument:

> It would be a substantial extension of our holdings . . . to allow the Unions in this case to leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the [postal monopoly statutes]. We decline to make that extension . . . .

498 U.S. at 530. n6

n5 More specifically, the Court held that the unions were not within the "zone of interests" of the postal monopoly statutes under the APA. As explained in footnote 1 above, it follows *a fortiori* that the unions would lack prudential standing if the APA were not applicable.

n6 Similarly, though there must be innumerable business persons who would suffer injury in fact from a contract partner's loss of a tax dispute, Justice Stewart has pithily opined that he "cannot now imagine a case, at least outside the *First Amendment* area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 46, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)* (Stewart, J., concurring).

The Supreme Court's holdings, outside of the exceptional contexts, thus require us to find that the lawyers in this case lack standing to litigate the interests of their future unascertained clients. It would be a short step from the

majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients. In many circumstances a lawyer could demonstrate *Article III* injury in fact with regard to such claims. For instance, a workers compensation attorney could show that the attorney's livelihood will be adversely affected by the **[*710]** implementation of a new regulation curtailing workers compensation benefits. An attorney who specializes in medical malpractice plaintiffs' cases could show that the attorney's livelihood will be adversely affected by a tort reform statute. An attorney who specializes in Social Security cases could show that a nonspeculative reduction in the attorney's income would result from the implementation of a new Social Security regulation. In each of these cases it would be anomalous for the attorney to be able to bring suit to challenge the statute or regulation, instead of a person protected by the constitutional provision or law asserted as the basis for the challenge--the injured worker, the medical malpractice plaintiff, or the Social Security claimant. Of course it may be harder for such a person to bring suit than for a lawyer to bring suit, since lawyers are often better off than their potential clients, and they are after all lawyers. But it still can't be that lawyers would generally have standing in such situations. *See Alexander v. Whitman, 114 F.3d 1392, 1408-09 (3d Cir. 1997)* (holding that attorney and law firm lacked prudential standing to challenge a state statute which provided that a wrongful death action could only be brought on behalf of a fetus if the fetus was born alive, and noting that "we can not help but wonder how the [lawyer and law firm] plaintiffs can seriously challenge the district court's ruling as to their lack of standing.") *Cf. Lambert v. Turner, 525 F.2d 1101, 1102-03 (6th Cir. 1975)* (holding that Legal Services attorney lacked standing to challenge state court judge's alleged retaliation against clients represented by Legal Services for using legal services; relying upon *Article III* and *Younger* comity).

III. The Three-Part Test Used in Exceptional Contexts

Even in the contexts where the Supreme Court has been liberal in finding third-party standing, it has used a three-part test to determine whether third-party standing is permitted. Plaintiffs argue, based on the applications of that test in the specialized circumstances contexts listed previously, that the test should be liberally applied outside of those contexts to a case where a lawyer's alleged injury is simply that he will lose business if the government is not required to give his future clients the means to hire him. Even though some of those cases permitted lawyers as parties to seek to vindicate the interests of non-party clients, they can only be reconciled with the more general rule against third-party standing if one recognizes that the standards are different in the identified contexts.

Assuming that this case falls in some new exceptional category, which it does not appear to do, the lawyer plaintiffs fail the three-part test used in those contexts. This test, formulated by the Supreme Court in *Powers, 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364*, permits a litigant to bring suit on behalf of a third party if: 1) the litigant has suffered an injury in fact, 2) the litigant has a close relationship to the third party, and 3) there is some hindrance to the third party's ability to protect his own interests. *Id. at 410-11.*

The first "prong" is but a restatement of the requirement of *Article III* standing and thus adds little to resolving whether a plaintiff who has *Article III* standing also has prudential standing. I agree with the majority that the lawyers in this case have adequately shown injury in fact because of the potential fees they will receive if successful on the merits. It is also reasonable to assume that the interests of the lawyers coincide with those of their future clients so that there is a sufficiently "close" relationship **[*711]** to the third party for purposes of the second prong of the analysis.

It appears, however, that the third prong of the test is clearly and classically not met in this case. That is, there is no hurdle to a criminal defendant who has plea bargained, and who has not been provided state-funded counsel on appeal, to challenge the lack of state-funded counsel. Not only is there no "chill," *Singleton, 428 U.S. at 117*, but--as recognized by the majority--an indigent plea-bargaining Michigan criminal defendant has already asserted his legal rights and interests in the Michigan courts, taken his case to the Michigan Supreme Court, and petitioned the U.S. Supreme Court on the merits, albeit unsuccessfully. *People v. Bulger, 462 Mich. 495, 614 N.W.2d 103 (Mich.), cert. denied, 531 U.S. 994 (2000)*. No such alternative route was likely to be used, much less already used to raise the identical claim, in those cases where the Supreme Court relied on the third prong of its test to uphold third-party standing. n7 It is thus clear that comparable third parties in this case *can* assert their own rights, only not in the lower federal courts while state proceedings are underway, and the only obstacle to the assertion of their rights in the federal courts is the abstention doctrine. n8 Equating the abstention doctrine, a legal principle of comity, with the "genuine obstacle" of *Singleton* and *Powers* deeply undermines the policies underlying both abstention and prudential standing.

n7 In my view, the fact that counsel was appointed in *Bulger* strengthens rather than weakens the point that a viable alternative route exists to bring up the issue. The potential future difficulty of obtaining appointed counsel to raise a subsequent challenge in the state courts, where that difficulty results from a square holding of the Michigan Supreme Court on the asserted constitutional claim, does not imply the absence of a route for a plaintiff with standing ever to raise the constitutional issue in the first place.

n8 While it is not necessary to my analysis in this case, it should be noted that comparable claims to

appointment of appellate counsel have been brought under federal habeas corpus. *See Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); Evitts v. Lucey, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*.

Plaintiff lawyers in this case cannot argue that indigent state defendants who have plea bargained are not able to raise the appointment-of-appellate-counsel issue in the state courts, since a state appeal has already been taken. Moreover, according to the majority, indigent state defendants who have plea bargained can also raise the appointment-of-appellate-counsel issue in the lower federal courts, if they wait until state criminal proceedings are concluded. *Ante* at 10. The only hindrance to indigent state defendants raising the appointment-of-appellate-counsel issue is the *Younger* principle that precludes interference with ongoing state proceedings.

This is very much unlike the situation in *Caplin & Drysdale v. United States, 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989)*, relied upon by plaintiffs to support lawyer standing. The *Caplin & Drysdale* Court, in a footnote, upheld third party standing for a law firm suing to get a share of its client's assets that had been seized under criminal forfeiture laws, where the law firm relied on asserted *Fifth* and *Sixth Amendment* rights of its clients. *491 U.S. at 624 n.3*. The client in order to obtain a plea agreement had agreed to forfeit all of his property to the government, leaving nothing to the lawyers. *491 U.S. at 621*. In such cases the very clients whose interest is being asserted by the lawyers are subject to plea-bargaining pressure to forgo the lawyer's claims, which the clients **[*712]** have no interest in protecting. This is exactly what happened in that case. n9 In contrast, in this case there is no perceivable obstacle to having the appointment-of-counsel issue raised by the defendants themselves. Certainly there should be no difficulty in obtaining a lawyer to litigate the issue. If the lawyer plaintiffs in this case

are willing through their own efforts to support this litigation *as parties*, there is every reason to expect them to be just as willing to *represent* indigent defendants who have plea-bargained and want to appeal. The only conceivable hurdle, then, to indigent state defendants' raising the appointment-of-counsel issue in the lower federal courts is that the abstention principles of *Younger v. Harris* apply. It makes no sense, however, to view the circumvention of *Younger* principles as an affirmative basis for relaxing prudential standing requirements. If anything, the principles underlying both *Younger* abstention and prudential standing should result in the same outcome, in this case deference to state court processes. In short, plaintiff lawyers have cited no cases in which third-party standing was permitted solely in order to restore to the lower federal courts a class of cases that otherwise by application of federalism principles would have to be brought in the state courts, subject of course to direct review in the U.S. Supreme Court.

n9 *Caplin & Drysdale*, it should be noted, is also distinguishable from the instant case because it involved direct enforcement of criminal forfeiture provisions against property claimed by the plaintiffs. See part II, *supra*.

I concur in the majority's application of *Younger* to require abstention regarding the claims of the named indigent criminal defendants in this case. I respectfully dissent from the grant of relief to the lawyers in this case who seek to litigate, as parties in federal court, the interests of future unascertained clients.

NORRIS, Circuit Judge, dissenting. In discussing whether the equal protection component of our Federal Constitution requires the appointment of counsel to help indigent defendants prepare applications for review in the context of discretionary appeals, the Supreme Court has noted, "The question is not one of absolutes, but one of degrees." *Ross v. Moffitt, 417 U.S. 600, 612, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974)*. In this close case,

I believe that the Majority Opinion cites to the proper authority and asks all of the right questions en route to its conclusion. With all due respect, however, I believe that the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system as defined by *Ross*. Accordingly, I dissent.

The provisions of the challenged statute read as follows:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> [*713] (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Mich. Comp. Laws § 770.3a. By its own terms, the statute carves out significant exceptions to the denial of counsel to indigent defendants who have pleaded guilty. These exceptions are designed to protect a defendant in those situations where he has the most at stake: when the prosecutor appeals; when the sentence falls above the sentencing range; and when he has preserved an issue by entering into a conditional plea. We note

that the Statute *requires* appointment of counsel under these circumstances.

In addition, the statute accords the trial court discretion to appoint counsel when there has been a dispute about the manner in which the sentence has been calculated or when an issue has otherwise been preserved for appeal. Furthermore, the statute seeks to protect a defendant from waiving his rights to counsel unwittingly by requiring the court to explain the implications of a guilty plea with respect to appointment of counsel. Of course, the trial court is constitutionally required to ensure that a plea is entered knowingly; nonetheless, a defendant's attention is explicitly drawn to the fact that, if he enters a guilty plea, he will not enjoy the assistance of appointed appellate counsel.

In *Ross, supra,* the Supreme Court was asked to extend the right to appointment of counsel for an appeal as of right, which was articulated in *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*, to the preparation of petitions for leave to appeal to either the United States Supreme Court or to North Carolina's highest court. The Court declined to extend the right that far and, in so ruling, explained the constitutional underpinnings that guided its decision. After first recounting how both the Due Process and Equal Protection Clauses have been invoked in this context, the Court explained that, in its view, the Equal Protection **[*714]** Clause provided the more compelling rationale:

> It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination

of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894)*. The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California, supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.

. . . .

There are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The *Fourteenth Amendment* "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973)*, nor does it require the State to "equalize economic conditions." *Griffin v. Illinois, 351 U.S., at 23, 76 S. Ct., at 592* (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966)*, and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin v. Illinois, supra*; *Draper v. Washington,*

372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane v. Brown, 372 U.S. 477, 481, 83 S. Ct. 768, 771, 9 L. Ed. 2d 892*, or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas v. California, supra, 372 U.S. at 358, 83 S. Ct. at 817*. The question is not one of absolutes, but one of degrees. In this case we do not believe that the *Equal Protection Clause*, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

Ross, 417 U.S. at 610-12 (footnote omitted).

A month after the district court issued its injunctive order in the case before us, the Michigan Supreme Court released an opinion holding that the indigent defendants are not "entitled to the appointment of counsel at public expense when applying for leave to appeal a plea-based conviction." *Michigan v. Bulger, 462 Mich. 495, 499, 614 N.W.2d 103, 104, cert. denied, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 486 (2000)*. It offered the following rationale:

> Appeals from plea-based convictions and appeals from convictions obtained **[*715]** following trials, like those appeals at issue in *Douglas* and *Ross*, are fundamentally different. Foremost, a defendant who tenders a plea has admitted guilt of the offense in open court. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal

process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).*

. . . In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

Bulger, 462 Mich. at 515-517, 614 N.W.2d at 112-13 (citations and footnote omitted).

Plaintiffs take issue with the distinction drawn by the Michigan Supreme Court between appeals of right and discretionary appeals. In their view, this emphasis is misplaced. Instead, the key is whether the appeal is a defendant's first appeal. Hence, this case is closer to *Douglas* than to *Ross* because the latter involved a discretionary appeal after the first appeal of right had been adjudicated. They point to the following language in *Douglas*: "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas, 372 U.S. at 357*. They buttress the force of this observation by pointing out that, as of 1987, 47 states permitted first appeals as of right and that cases like *Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967)*, referred to the right to have counsel advocate on one's behalf in the "first appeal."

As already mentioned, however, "the question is not one of absolutes, but one of degrees." *Ross, 417 U.S. at 612*. While the appeal at issue in this case is undoubtedly a defendant's first appeal, it has also been rendered discretionary by his decision to plead guilty. The state has a fundamental interest in the finality of guilty pleas, *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985)*, and by entering a plea a defendant has voluntarily acknowledged that he does not dispute the factual basis of the state's case against him. Given that there has not been an underlying trial, the number of issues for appeal has been greatly reduced. n1 Furthermore, the statute provides that a defendant can guarantee himself appointed appellate counsel by entering a conditional plea that preserves those issues that trial counsel has identified as viable on appeal. *Mich. Comp. Laws § 770.3a(2)(d)*. In short, the protections built into the statute convince me that in **[*716]** this "matter of degrees" the balance tips in favor of constitutionality.

n1 It is worth noting that this court has upheld plea agreements in which defendants unconditionally waive the right to appeal. *See, e.g., United States v. Fleming, 239 F.3d 761, 763-64 (6th Cir. 2001)* (defendant in criminal case may waive the right to appeal); *United States v. Allison, 59 F.3d 43, 46-47 (6th Cir. 1995)* (same); *United States v. Ashe, 47 F.3d 770, 775-76 (6th Cir. 1995)* (same). While not completely analogous, it nonetheless strikes me as inconsistent that we would approve a practice that potentially cuts off all appellate avenues while striking down the Michigan scheme, which leaves limited, statutorily defined appellate remedies available to defendants.

In addition to the protections built into the statute itself, Michigan's Supreme Court has interpreted its own court rules to "require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues

that warrant preservation." *Bulger, 462 Mich. at 518, 614 N.W.2d at 113* (interpreting Mich. Ct. R. 6.005(H)(4), which provides that "the responsibilities of the trial lawyer appointed to represent the defendant include . . . unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing."). As a federal court, we are bound by Michigan's highest court's interpretation of the Michigan's court rules. *See Moore v. Sims, 442 U.S. 415, 427, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)* (noting "the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework").

In *Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967),* the Supreme Court found unconstitutional California's practice of allowing a defendant's appointed counsel to review the defendant's trial record, and then withdraw from representation by submitting a letter to the reviewing court stating that, in his opinion, there existed no meritorious grounds for appeal. *386 U.S. at 743*. The Court held, nonetheless, that the appointed counselor could ask to withdraw and opine on the merits of the case before the reviewing court if he attached to his request to withdraw "a brief referring to anything in the record that might arguably support the appeal;" the reviewing court would then have the ability to review the case and ask the counselor to remain as a representative of the defendant if the court found any meritorious grounds for appeal. *Id. at 744*. Though not obligatory on the States, such a process would pass constitutional muster. *Smith v. Robbins, 528 U.S. 259, 272-73, 145 L. Ed. 2d 756, 120 S. Ct. 746 (2000).*

The Court in *Smith*, after reviewing *Evitts, Ross, Douglas*, and other cases dealing with an indigent defendant's right to

counsel on appeal, stated that, in sum, the Constitution requires that "a State's procedure afford adequate and effective appellate review to indigent defendants, . . . [which it does] so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Smith, 528 U.S. at 276-77* (internal quotations and citations omitted). In the case before us, even though the defendant's trial lawyer is only required to present "potential issues that warrant preservation" to the *trial* court, the defendant is nonetheless left with the benefits of a lawyer's review of the record and is not placed in the situation, condemned by the Supreme Court, "where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself." *Douglas v. California, 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)*. Given that Michigan law requires a defendant's appointed trial lawyer to "assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation," *Bulger, 462 Mich. at 518, 614 N.W.2d at 113,* and that the trial court is required to appoint appellate counsel if the appellate court grants leave to appeal, *Mich. Comp. Laws § 770.3a(2)(c)*, I fail to see how Michigan's statutory scheme unconstitutionally bars an indigent defendant's meaningful access to the court system.

Finally, the Majority Opinion acknowledges that we are obliged to fill in the gaps left by the Supreme Court on this issue. To that end, I note that the Court denied certiorari in *Bulger, supra,* an opinion that came to a contrary conclusion on the practice, if not the actual statute, at issue in this case despite an entreaty from the dissent that the Court take the case to "correct the constitutional miscarriage committed by the majority." *462 Mich. at 522, 614 N.W.2d at 115* (Cavanagh, J., dissenting). While not dispositive of the matter before us, the Court's denial of certiorari strikes me as entitled to some

weight in our effort to determine where, in this "matter of degrees," the Court might draw the line.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Nos. 00-1824/1845

Filed
Jun 17, 2003
Leonard Green, Clerk

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER,

Plaintiffs-Appellees,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant,

JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges,

Defendants-Appellants (00-1824),

JUDGE DENNIS C. KOLENDA, Appellant (00-1845).

Before: MARTIN, Chief Circuit Judge; BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs.

THIS CAUSE was heard and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-1824/00-1845

295 F.3d 536; 2002 U.S. App. LEXIS 13148; 2002 FED App. 0220P (6th Cir.)

JOHN CLIFFORD TESMER; CHARLES CARTER; and ALOIS SCHNELL, on behalf of all similarly situated individuals; ARTHUR M. FITZGERALD; and MICHAEL D. VOGLER, Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, Attorney General, Defendant, JUDGE JOHN F. KOWALSKI; JUDGE WILLIAM A. CRANE; and JUDGE LYNDA L. HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants-Appellants, JUDGE DENNIS C. KOLENDA, Appellant.

December 5, 2001, Argued
July 2, 2002, Decided
July 2, 2002, Filed

JUDGES: Before: NORRIS, SILER, and BATCHELDER, Circuit Judges.

[*538] ALAN E. NORRIS, Circuit Judge. As amended in 1994, the Michigan Constitution provides that individuals who plead guilty to a crime may only appeal by leave of the court. Mich. Const. 1963, Art. 1, § 20. The question litigated below centered on whether the federal constitution requires appointment of counsel to assist indigent defendants who wish to apply for leave to appeal. The district court issued a declaratory judgment holding that the denial of appointed counsel under these circumstances violates the United States Constitution. In an effort to enforce its judgment, the court enjoined the Michigan judiciary from following the contested provision of the Michigan Constitution, as well as the statute designed to codify it.

[*539] We conclude that the district court should have abstained from hearing the claims of the three criminal-defendant plaintiffs because they could have raised their constitutional claims in their pending state court proceedings, as evidenced by the fact that a nearly identical challenge was wending its way through the courts of Michigan at the time that the litigation before us was commenced. That does not end our inquiry, however, because we agree with the district court that the two attorney plaintiffs had *jus tertii* standing to challenge the statute codifying the practice of appointing appellate counsel to indigent defendants. Nonetheless, we hold that the statute at issue sufficiently protects an indigent defendant's constitutional rights.

Accordingly, we dissolve the injunction issued by the district court, reverse and vacate its grant of declaratory relief, and remand the matter with instructions to enter judgment in favor of defendants.

I.

The plaintiffs, three criminal defendants and two attorneys who accept appointments to represent criminal defendants in law appeals, filed suit in federal court on March 2, 2000,

alleging that the practice of denying appointed appellate counsel to indigent defendants who have pleaded guilty or nolo contendere in Michigan courts violated the federal constitution. Defendants included three circuit court judges who had declined to appoint counsel to plaintiffs after accepting their guilty pleas. n1

n1 The complaint also named Jennifer Granholm, the Attorney General of Michigan, as a defendant in her official capacity. She is not a party to this appeal.

Although the constitutional violations alleged in the complaint occurred prior to the enactment of the statute that codified the provision of the Michigan Constitution at issue, *1999 P.A. 200;* Mich. Comp. Laws § 770.3a (2000) ("the statute"), the attorney plaintiffs sought an order declaring that it, too, ran afoul of the federal constitution. On March 31, 2000, the district court granted declaratory relief, holding that "the practices of the judicial officer Defendants and other similarly situated state circuit court judges, of denying indigents who have pleaded guilty or nolo contendere the right to appointed appellate counsel in preparing applications for leave to appeal, to be in violation of the indigents' equal protection and due process rights guaranteed under the United States Constitution." *Tesmer v. Granholm, 114 F. Supp. 2d 603, 606 (E.D. Mich. 2000).* The district court struck down the statute for the same reason. *Id.*

After this declaratory judgment was entered, plaintiffs sought injunctive relief because certain Michigan judges continued to deny appointed counsel in these situations. The district court enjoined all Michigan judges from taking any action whatsoever to enforce or implement the statute. *Tesmer v. Kowalski, 114 F. Supp. 2d 622, 629 (E.D. Mich. 2000).* The three named defendant judges have appealed from this injunction, as has Judge Dennis C. Kolenda, who was not named as an original defendant but who was nonetheless affected by the district court's action.

While this litigation was progressing in federal court, an action involving this same question was making its way through the courts of Michigan. Ultimately the Michigan Supreme Court issued an opinion that contrasted sharply to that of the district court:

> We granted leave in this case to determine whether an indigent defendant is entitled to the appointment of appellate counsel at public expense when applying for leave to appeal a plea-based **[*540]** conviction. We hold that neither the state nor the federal constitution requires the appointment of counsel under these circumstances. Under our federalist scheme of government, Michigan remains free to decide the conditions under which appellate counsel will be provided where our state constitution commands that the mechanism of appellate review is discretionary. Const. 1963, art. 1, § 20.

People v. Bulger, 462 Mich. 495, 499, 614 N.W.2d 103, 104-05, cert. denied, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 486 (Mich. 2000). The Michigan Supreme Court did not reach the constitutionality of the statute, however, because it did not apply to defendant. *Bulger, 462 Mich. at 506, 614 N.W.2d at 107.*

II.

As they did below, defendants argue that the district court should have abstained from taking action because the ongoing criminal proceedings in the courts of Michigan provided plaintiffs who had pleaded guilty with an adequate opportunity to press their constitutional challenges. They also urge us to find that the attorney plaintiffs lacked standing to bring suit. We will address each of these arguments in turn.

1. Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971),* the Supreme Court counseled federal courts to abstain from adjudicating a matter otherwise properly before it in deference to pending state criminal proceedings in the interest of "Our Federalism." *Id. at 43-45; Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)* (discussing comity and other concerns of federalism); *see also Zalman v. Armstrong, 802 F.2d 199, 201-02 (6th Cir. 1986).* In a companion case, the Court held that the rule announced in *Younger* with respect to injunctive relief applied with equal force to requests for declaratory relief:

> In cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.

Samuels v. Mackell, 401 U.S. 66, 73, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971).

This circuit looks to three factors when determining whether *Younger* abstention is appropriate: (1) whether the underlying proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge. *Tindall v. Wayne County Friend of the Court, 269 F.3d 533, 538 (6th Cir. 2001); Cooper v. Parrish, 203 F.3d 937, 954 (6th Cir. 2000); Hayse v. Wethington, 110 F.3d 18, 20 (6th Cir. 1997); Zalman, 802 F.2d at 202.* In a nutshell, *Younger* instructs a federal court to abstain "when the state's interest is

so important that exercising federal jurisdiction would disrupt the comity between federal and state courts." *Hayse, 110 F.3d at 20.* We review the district court's decision respecting abstention de novo. *Tindall, 269 F.3d at 538.*

A. Pending State Action

We begin by asking whether the first requirement for *Younger* abstention has been satisfied: the existence of pending state-court proceedings involving plaintiffs. In answering this question, "the **[*541]** proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalman, 802 F.2d at 204.* A case remains pending until the litigant has exhausted his state appellate remedies. *Huffman, 420 U.S. at 609; see also Foster v. Kassulke, 898 F.2d 1144, 1146 (6th Cir. 1990).* Moreover, the existence of state habeas corpus relief may keep a claim pending for purposes of abstention analysis. *Foster 898 F.2d at 1146.*

As mentioned earlier, the complaint includes five plaintiffs: three criminal defendants who pleaded guilty and two attorneys who allege that they have accepted referrals in the past and contemplate doing so in the future. The parties agree that abstention only applies to the criminal-defendant plaintiffs Tesmer, Carter, and Schnell.

According to the complaint, plaintiff Tesmer pleaded guilty to a charge of home invasion in 1999. He then presented a written request to the sentencing court for the appointment of an appellate attorney to prepare an application for leave to appeal. This request was denied on September 7, 1999. The district court concluded that it should abstain from adjudicating Tesmer's claim because he was party to a pending action in state court, he had adequate opportunity to raise his constitutional arguments in the state court proceeding, and no extraordinary circumstances justified interference in these state court proceedings. *Tesmer v. Granholm, 114 F. Supp. 2d at*

612-14. Appellees do not challenge the district court's decision to abstain in the case of Mr. Tesmer.

With respect to plaintiff Carter, the district court noted that an action was pending in state court. However, it found abstention to be inappropriate as to him because he lacked an adequate opportunity to raise his constitutional claim, a conclusion that will be discussed in the next section of this opinion.

Finally, the district court concluded that plaintiff Schnell did not have a pending state action. *Id. at 612.* His application for leave to appeal had been denied on April 1, 1999 and his request for rehearing was denied on May 25, 1999. Under the appropriate Michigan rules, Schnell had 56 days in which to file a delayed application for leave to appeal with the Michigan Supreme Court. Thus, in the district court's view, at the time the federal complaint was filed, Schnell's state action had been completed and abstention as to him was inappropriate. *Id.*

We disagree with this analysis. As our decision in *Foster, supra, makes clear, the decision to abandon avenues of state-court relief does not necessarily rule out abstention. In Foster,* plaintiff challenged the constitutionality of a Kentucky statute limiting the amount of compensation to which her appointed counsel was entitled, as well as the practice of not providing a trial transcript. *Foster, 898 F.2d at 1145.* While her claims had been denied by the courts of Kentucky at the time her § 1983 complaint was filed, this court concluded that she could pursue her claims on direct appeal and, failing there, could resort to state habeas relief:

> In seeking injunctive relief in her section 1983 action, she is attempting to obtain federal review of state court procedures in a criminal case before the state court has had the opportunity to decide them finally. Federal review should be given in the context of a federal habeas proceeding following

> the appropriate exhaustion of state remedies, where concerns of equity, comity, and federalism -- concerns that *Younger* teaches require abstention -- are accommodated.

[*542] *Id. at 1146-47.* In short, *Younger* requires that a party exhaust state remedies before instituting a constitutional challenge in federal court. In *Huffman*, for instance, the plaintiff failed to take an appeal from an adverse trial court decision and instead filed suit in federal court. He argued that *Younger* should not apply because the state court litigation had ended. The Court disagreed, noting that "a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman, 420 U.S. at 608.* This is so "because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions." *420 U.S. at 609.* Moreover, "the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *420 U.S. at 610.*

In our view, the considerations delineated in *Huffman* apply to plaintiff Schnell. His failure to pursue his claim by filing a delayed application for leave to appeal with the Michigan Supreme Court or, for that matter, instituting a habeas corpus action under Michigan law, Mich. Comp. Laws § § 600.4301-87, means that he has failed to exhaust his state court remedies and abstention is therefore appropriate unless "he can bring himself within one of the exceptions specified in *Younger*." *Huffman, 420 U.S. at 608; see also Foster, 898 F.2d at 1146* ("even assuming an adverse judgment on appeal, [plaintiff] still has resort to state habeas relief, where the constitutionality of the state procedures could be determined by the state court.").

Accordingly, we conclude that each of the three criminal-defendant plaintiffs had an ongoing state court proceeding at the time that the federal complaint in this action was filed.

B. Adequate Opportunity to Raise Constitutional Claims

In considering the applicability of the *Younger* abstention doctrine, the federal plaintiff "has the burden to show that the state procedural law barred presentation of [its] claims." *Armco, Inc. v. USW, AFL-CIO, Local 169, 280 F.3d 669, 682 (6th Cir. 2002)* (internal punctuation omitted) (citing *Federal Express Corp. v. Tennessee Public Serv. Comm'n, 925 F.2d 962, 970 (6th Cir. 1991)).* A federal court should not exert jurisdiction if the plaintiff had an opportunity to present his federal claim in state proceedings. *Moore v. Sims, 442 U.S. 415, 425, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979)* (citing *Juidice v. Vail, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977)).* Accordingly, "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *442 U.S. at 425-26.* Put another way, "When a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987).*

The district court found that plaintiff Tesmer had an adequate opportunity to present his federal claims because he filed a "lawyerly brief" seeking a delayed application for leave to appeal. *Tesmer v. Granholm, 114 F. Supp. 2d at 613.* The court concluded, however, that plaintiff Carter, though similarly situated, did not have such an opportunity because he filed a declaration stating that "he did not have a **[*543]** lawyer to represent him and he did not know the law." *Id.*

We are unable to agree with the district court's view of the scope of its inquiry with respect to whether the state provided

plaintiff Carter with an adequate opportunity to raise his constitutional claims. The "adequate opportunity" prong of the abstention doctrine requires a generalized review of the procedures made available by the state to raise constitutional issues. As the cases cited above make abundantly clear, in the absence of compelling evidence to the contrary, there is a strong presumption of adequacy.

Here, the district court determined that plaintiff Tesmer had an adequate opportunity to raise his claim. If he had an adequate opportunity, then plaintiff Carter, who was similarly situated, did also. That plaintiff Carter was allegedly unable to take advantage of the opportunity because of the lack of appointed counsel has no bearing upon the *Younger* inquiry; it goes directly to the merits of the case. Furthermore, the adequacy of the state mechanism for raising the constitutional claim is evident given that a criminal defendant managed to present nearly the identical claim to the Michigan Supreme Court in *Bulger, 462 Mich. 495, 614 N.W.2d 103.*

Of course, the fact that the district court should have abstained does not mean that plaintiff Carter can never pursue his claim in a federal forum. The *Younger* abstention doctrine merely delays federal adjudication, it does not preclude it. *See Huffman, 420 U.S. at 606* ("Assuming . . . that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings.") (emphasis original). n2

> n2 As the Court recognized in *Huffman*, we do not mean "to suggest that there is a right of access to a federal forum for the disposition of all federal issues." *Huffman, 420 U.S. at 606, n.18, 43 L. Ed. 2d 482, 95 S. Ct. 1200.*

C. Extraordinary Circumstances

The district court considered whether extraordinary circumstances existed that would make abstention inappropriate only with respect to plaintiff Tesmer. However, given the similarity of their situations, the same analysis applies to all three criminal-defendant plaintiffs.

Circumstances justifying federal court interference with state proceedings only exist where irreparable injury is both "great and immediate"; where the state law is "flagrantly and patently violative of express constitutional prohibitions"; or where there is a showing of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief." *Younger, 401 U.S. at 46, 53-54.* We agree with the district court's conclusion that plaintiffs have failed to show that such circumstances exist in this case.

D. Conclusion

For the reasons outlined above, we conclude that the district court should have abstained from hearing the claims of the criminal-defendant plaintiffs. As *Younger* and its progeny make clear, the principles of "Our Federalism" dictate that state courts generally be given an opportunity in the first instance to adjudicate cases without federal interference. *Younger, 401 U.S. at 43-45.* The district court's decision respecting abstention is therefore reversed.

2. *Jus Tertii* Standing for Attorney Plaintiffs

As the district court recognized, the three criminal-defendant plaintiffs could not challenge the constitutionality of the statute that codified the allegedly unconstitutional practice of denying appointment of appellate counsel because it had not been enacted at the time that they pleaded guilty. Consequently, that constitutional challenge could only be raised, if at all, by attorney plaintiffs.

Defendants contend that the attorneys lack standing because they are asserting the rights of third parties, indigent defendants. In order to press their claims, they must have suffered an "injury in fact." As already mentioned, the complaint alleges that both attorneys earn a portion of their income by "taking assigned appeals from trial and plea based convictions" and that the Statute will "adversely affect the incomes of Mr. Fitzgerald and Mr. Vogler in that it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel."

The district court concluded, and we agree, that the doctrine of *jus tertii* applies under these circumstances. The Supreme Court has explained that the doctrine permits a litigant to bring suit on behalf of a third party provided certain conditions apply: the litigant must have suffered an injury in fact; he must have a close relation to the third party; and there must be some hindrance to the ability of the third party to assert his own interests. *See Powers v. Ohio, 499 U.S. 400, 410-411, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991).*

The Supreme Court's analysis in *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976),* applies forcefully to the facts before us. In *Singleton*, two physicians challenged restrictions on funding for abortions performed for Medicaid-eligible patients. The Court began by observing that, "'ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.'" *Id. at 114* (quoting *Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953)).* However, this rule "should not be applied where its underlying justifications are absent." *Id.*

The Court first found that the physicians alleged a concrete injury:

> If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.

Singleton, 428 U.S. at 113. The same reasoning applies to the attorney plaintiffs. They have alleged that they have represented indigent defendants in the past for which they received payment from the state and that they will continue to do so in the future. As in *Singleton*, plaintiffs will suffer an actual injury if the statute remains in force.

The next consideration concerns the relationship between the litigants and the persons whose rights they seek to enforce:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Id. at 114-15. Applying this test to the facts before it, the district court concluded that the relationship between the attorneys and the indigent defendants was sufficient:

> The Attorneys have a close relationship to indigent defendants who are denied appellate counsel; and, the Attorneys are the appellate counsel whose services are being denied. Furthermore, just as a woman cannot safely secure an abortion without a

> physician, indigent defendants need counsel to effectively present their appellate claims.

Tesmer v. Granholm, 114 F. Supp. 2d at 610. This reasoning strikes us as correct. While the indigent defendants seek counsel and the attorney plaintiffs seek payment for their services, both parties seek the same end: the nullification of the statute. Accordingly, we conclude that the interests of the attorney plaintiffs are sufficiently close to those of indigent defendants to support *jus tertii* jurisdiction.

Finally, in *Singleton*, the Supreme Court sketched the third jurisdictional requirement in these terms:

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by the default the right's best available proponent.

428 U.S. at 116. This involves something short of the absolute procedural bar required to overcome the principle of abstention. *Id.* at n.6. (stating that this does not require that "assertion by the third parties would be in 'all practical terms impossible'") (internal citation omitted). In the case before us, the criminal-defendant plaintiffs assert that they have been deprived of effective access to the courts. As the district court put it, "indigent defendants denied appellate counsel face significant, insurmountable obstacles in bringing their own challenges to the [statute]." *Tesmer, 114 F. Supp. 2d at 611.* Although these obstacles are insufficient to overcome the more stringent requirements of abstention, they are sufficient to satisfy the requirements for *jus tertii* standing.

In our view, the district court correctly concluded that the attorney plaintiffs met the criteria for *jus tertii* jurisdiction outlined by the Court in *Singleton* and *Powers*. Accordingly, they have standing to challenge the Statute. We now turn to the merits of their claim.

3. Constitutionality of the Statute

The provisions of the challenged statute at issue read as follows:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel **[***15]** appointed for review of the defendant's conviction or sentence.
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> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
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> (a) The prosecuting attorney seeks leave to appeal.
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> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
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> **[*546]** (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.30(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads

guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Mich. Comp. Laws § 770.3a. By its own terms, the statute carves out significant exceptions to the denial of counsel to indigent defendants who have pleaded guilty. These exceptions are designed to protect a defendant in those situations where he

has the most at stake: when the prosecutor appeals; when the sentence falls above the sentencing range; and when he has preserved an issue by entering into a conditional plea. We note that the statute *requires* appointment of counsel under these circumstances.

In addition, the statute accords the trial court discretion to appoint counsel when there has been a dispute about the manner in which the sentence has been calculated or when an issue has otherwise been preserved for appeal. Furthermore, the statute seeks to protect a defendant from waiving his right to counsel unwittingly by requiring the court to explain the implications of a guilty plea with respect to appointment of counsel. Of course, the trial court is constitutionally required to ensure that a plea is entered knowingly; nonetheless, a defendant's attention is explicitly drawn to the fact that, if he enters a guilty plea, he will not enjoy the assistance of appointed appellate counsel.

Despite these protections, the district court held that the statute violated the United States Constitution: "When a rich man is given a meaningful opportunity to appeal while a poor man is given only a meaningless ritual, that is invidious discrimination." *Tesmer, 114 F. Supp. 2d at 618-19* (citing *Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963))*. While this is a close question, we disagree with the conclusion of the district court.

In *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974),* the Supreme Court was asked to extend the right to appointment of counsel for an appeal as of right, which was articulated in *Douglas,* to the preparation of petitions for leave to appeal to either the United States Supreme **[*547]** Court or to North Carolina's highest court. The Court declined to extend the right that far and, in so ruling, explained the constitutional underpinnings that guided its decision. After first recounting how both the Due Process and Equal Protection Clauses have been invoked in this context, the Court explained that the

Equal Protection Clause provided the more compelling rationale:

> It is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894).* The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California, supra.* Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.
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> . . . .
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> There are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez, 411*

> *U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973),* nor does it require the State to "equalize economic conditions." *Griffin v. Illinois, 351 U.S. 12, 23, 100 L. Ed. 891, 76 S. Ct. 585, 592* (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966),* and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin v. Illinois, supra; Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963).* The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane v. Brown, 372 U.S. 477, 481, 9 L. Ed. 2d 892, 83 S. Ct. 768, 771,* or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas v. California, supra, 372 U.S. at 358, 83 S. Ct. at 817. The question is not one of absolutes, but one of degrees.* In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

Ross, 417 U.S. at 610-12 (footnote omitted) (emphasis added).

A month after the district court issued its injunctive order in the case before us, the Michigan Supreme Court released an opinion holding the indigent defendants are not "entitled to the appointment of counsel at public expense when applying **[*548]** for leave to appeal a plea-based conviction." *Bulger,*

462 Mich. at 499, 614 N.W.2d at 104. It offered the following rationale:

> Appeals from plea-based convictions and appeals from convictions obtained following trials, like those appeals at issue in *Douglas* and *Ross*, are fundamentally different. Foremost, a defendant who tenders a plea has admitted guilt of the offense in open court. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).*
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> . . . .
>
> . . . In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

Bulger, 462 Mich. at 515-517, 614 N.W.2d at 112-13 (citations and footnote omitted).

Plaintiffs take issue with the distinction drawn by the Michigan Supreme Court between appeals of right and discretionary appeals. In their view, this emphasis is misplaced. Instead, the key is whether the appeal is a

defendant's first appeal. Hence, they contend this case is closer to *Douglas* than to *Ross* because the latter involved a discretionary appeal after the first appeal of right had been adjudicated. They point to the following language in *Douglas*: "Where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas, 372 U.S. at 357.* They buttress the force of this observation by pointing out that, as of 1987, 47 states permitted first appeals as of right and that cases like *Anders v. California, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967),* referred to the right to have counsel advocate on one's behalf in the "first appeal."

As the Supreme Court noted, "The question is not one of absolutes, but one of degrees." *Ross, 417 U.S. at 612.* While the appeal at issue in this case is undoubtedly a defendant's first appeal, it has also been rendered discretionary by his decision to plead guilty. The state has a fundamental interest in the finality of guilty pleas, *Hill v. Lockhart, 474 U.S. 52, 58, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985),* and by entering a plea a defendant has voluntarily acknowledged that he does not dispute the factual basis of the state's case against him. Given that there has not been an underlying trial, the number of issues for appeal has been greatly reduced. Furthermore, the statute provides that a defendant can guarantee himself appointed appellate counsel by entering a conditional plea that preserves those issues that trial counsel has identified as viable on appeal. Mich. Comp. Laws § 770.3a(2)(d). In short, the protections built into the statute convince us that in this "matter of degrees" the balance tips in favor of constitutionality. n3

> n3 While it does not bind us, we note that the Supreme Court declined to grant certiorari to review the Michigan Supreme Court's *Bulger* decision.

[*549] III.

The injunction ordered by the district court is **dissolved**, the declaratory judgment is **vacated**, and this cause is **remanded** to the district court with instructions to enter judgment in favor of defendants.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
00-1824/00-1845

307 F.3d 459; 2002 U.S. App. LEXIS 19754

John Clifford Tesmer, et al., Plaintiffs-Appellees,

v

Jennifer Granholm, Attorney General, Defendant,
Judge John F. Kowalski, et al., Defendants-Appellants (00-1824),

Judge Dennis C. Kolenda, Appellant (00-1845).

September 20, 2002, Filed

Before: Martin, Chief Judge; Boggs, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman, And Gibbons, Circuit Judges.

[*459] ORDER

A majority of the Judges of this Circuit in regular active service have voted for rehearing **[*460]** of these cases en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court vacated, the mandate is stayed and these cases are restored to the docket as pending appeals.

It is further ORDERED that the parties file supplemental briefs not later than the close of business Friday, October 25,

2002. Reargument is scheduled for Wednesday, December 11, 2002.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

CASE NUMBER: 00-10082

114 F. Supp. 2d 603; 2000 U.S. Dist. LEXIS 16346

JOHN CLIFFORD TESMER, CHARLES CARTER, and ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals, and ARTHUR M. FITZGERALD and MICHAEL D. VOGLER, Plaintiff(s),

v.

JENNIFER GRANHOLM, Attorney General of the State of Michigan, in her official capacity; and JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE and JUDGE LYNDA HEATHSCOTT, in their official capacity, individually and as representatives of a class of similarly situated circuit court judges, Defendant(s).

March 31, 2000, Decided

JUDGES: Victoria A. Roberts, United States District Judge.

[*605] OPINION AND ORDER: (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, (2) DENYING PLAINTIFFS'

MOTION FOR PRELIMINARY INJUNCTION; AND (3) GRANTING PLAINTIFFS' REQUEST FOR DECLARATORY JUDGMENT

I. Introduction

This *42 U.S.C. § 1983* matter is before the Court on Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction. The Complaint, filed March 2, 2000, further requests that this Court issue an Order declaring that P.A. 1999 No. 200, violates the Plaintiffs' rights to due process and equal protection as guaranteed by the United States Constitution, and further declaring that the judicial officer Defendants acted under color of law, in violation of § 1983, in denying indigents the appointment of counsel to prepare original appeals from their plea-based convictions.

For the reasons stated below, the Court grants in part and denies in part Defendants' Motion to Dismiss. Further, while the Court finds that the judicial officer Defendants acted under color of law in denying indigents' requests for the appointment of counsel, § 1983 does not permit injunctive relief against a judicial officer for action taken in that officer's judicial capacity, unless such officer has violated a declaratory decree or declaratory relief was unavailable. Hence, this Court denies Plaintiffs' Motion For Preliminary Injunction.

However, pursuant to the Plaintiffs' request for relief in their complaint, the Court finds this case to be an appropriate one for declaratory **[**3]** relief under Fed. R. Civ. P. 57 and *28 U.S.C. § 2201*. Accordingly, **[*606]** the Court declares the practices of the judicial officer Defendants and other similarly situated state circuit court judges, of denying indigents who have pleaded guilty or nolo contendere the right to appointed appellate counsel in preparing applications for leave to appeal, to be in violation of the indigents' equal protection and due process rights guaranteed under the United States Constitution.

Additionally, the Court declares that *1999 P.A. 200*, scheduled to take effect on April 1, 2000, is unconstitutional in that it denies equal protection and due process to indigent individuals who have pleaded guilty or nolo contendere.

II. Background

In November 1994, Michigan's constitution was amended to eliminate appeals of right for criminal defendants who pled guilty or nolo contendere. Specifically, MI. Const. 1963, Art. 1, § 20 was amended to provide that criminal defendants may:

> appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Plaintiffs allege that after the amendment to § 20, a number of Michigan circuit court judges began to routinely deny the requests of indigent Defendants for the appointment of appellate counsel to prepare applications for leave to appeal their plea-based convictions and sentences. This practice is especially prevalent in the 10th Circuit Court in Saginaw, according to Plaintiffs (Cmpt. at P 18).

Three Plaintiffs allege that, consistent with this practice, the named judicial officer Defendants denied them appellate counsel. Plaintiff John Clifford Tesmer pled guilty to a charge of home invasion in 1999. After Defendant Judge John F. Kowalski of the 26th Circuit Court of Alcona sentenced Plaintiff, the judge denied Tesmer's request for appointed appellate counsel (Cmpt. at PP 19-22). After his 1999 guilty plea and sentencing for the charge of attempted murder, Plaintiff Charles Carter was denied appointed appellate counsel by Defendant Judge William A. Crane of the 10th Circuit Court (Cmpt. at PP 23-26). Likewise, Plaintiff Alois Schnell

was denied appellate counsel by Defendant Judge Lynda L. Heathscott of the 10th Circuit after Schnell's pled guilty to operating a vehicle under the influence of liquor (Cmpt. at PP 27-30). (Hereinafter, Judges Kowalski, Crane and Heathscott will be referred to as "the Judges," and Mr. Tesmer, Mr. Carter and Mr. Schnell will collectively be referred to as "the Indigents.")

The practice of denying appellate counsel to indigent Defendants who plead guilty or nolo contendere has now been codified. P.A. 1999, No. 200 provides:

> Sec. 3a. (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, **[*607]** or nolo contendere if all of the following apply:
>
> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other post conviction **[**7]** remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

(Hereinafter, the "Act").

Plaintiffs allege that, although the appointment of appellate counsel is authorized under the circumstances set forth in subsections 2 and 3, the Act will prohibit circuit court judges from appointing counsel to indigent defendants in most plea-based applications for leave to appeal (Cmpt. at P 32). n1

n1 Note that the practice and Act alleged to be unconstitutional involve the denial of counsel for the preparation of applications for leave to appeal. When leave to appeal is granted, the Act explicitly requires that appointed counsel be provided to indigent defendants.

The other two Plaintiffs are attorneys. Arthur M. Fitzgerald and Michael D. Vogler allege that they earn a portion of their incomes taking assigned appeals for trial and plea based convictions. Fitzgerald is on a list of qualified attorneys to take such assignments in the 10th Circuit while Vogler is on the 26th Circuit Court's list. Plaintiffs allege that the present practice of denying appellate counsel after plea-based convictions has adversely affected the attorneys' incomes and the Act will do the same (Cmpt at PP33-36). "Mr. Fitzgerald and Mr. Vogler also assert, under the doctrine of *jus tertii*, the constitutional rights of the indigent criminal defendants who will plead guilty or nolo contendere after April 1, 2000 and who will request, but be denied, the appointment of appellate counsel, based on the operation of P.A. 1999, No. 200." (Cmpt. at P 37). (Hereinafter, Mr. Fitzgerald and Mr. Vogler will be referred to as "the Attorneys.")

In addition to the Judges, Plaintiffs also name Michigan Attorney General Jennifer Granholm, in her official capacity, as a Defendant (Cmpt. at P 11).

Plaintiffs' Complaint is filed pursuant to § 1983. They allege that the practice of the Judges violates Plaintiffs' due process and equal protection rights and that the Act will do the same (Cmpt. at PP38-45). They assert their claims on behalf of a putative Plaintiff class consisting of all indigent Defendants who have pled or will plead guilty or nolo contendere in a Michigan court and who have or will request the appointment of appellate counsel (Cmpt. at 46). Plaintiffs' claims are asserted against the named Defendants as well as against a putative Defendant class consisting of all Michigan circuit court judges and their successors (Cmpt. at P 48).

III. Analysis

Plaintiffs' Motion for Preliminary Injunction focuses on the alleged illegality of the offending practice and the Act, while Defendants' Motion to Dismiss primarily **[*608]** challenges Plaintiffs' standing to bring this action and this Court's jurisdiction. Since standing and jurisdiction are threshold matters, this Opinion begins with those issues and ends with the merits of Plaintiffs' constitutional claims.

A. The Standing of the Attorneys to Challenge the Act

"Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.' Standing to sue or defend is an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997).*

Defendants primarily assert that the Attorneys have no direct stake in the controversy at issue here. Notwithstanding the Attorneys alleged loss of income, if criminal defendants are entitled to appellate counsel to prepare their applications for leave to appeal their plea based conviction, that right belongs to the criminal defendants only, according to Defendants.

The Court believes, however, that the Attorneys have standing pursuant to the doctrine of *jus tertii*. That doctrine is explained in *Powers v. Ohio, 499 U.S. 400, 410-411, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991).*

> In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. This fundamental restriction on our authority admits of certain, limited exceptions. n2 We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

(Citations and quotation marks omitted).

n2 It should be noted that one of the cases Defendants cite, *Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir.1993),* alluded to the exceptions of the direct injury requirement. The court stated, "Although the general rule is that a litigant may assert only his or her own rights, the court has recognized an exception to the prohibition against third party standing where certain criteria are met." *Portman* at 902. The *Portman* plaintiff was a terminated public defender who asserted the Sixth Amendment rights of his clients in his attempt to establish standing. The court did not address whether the criteria for third party standing were met in that case because the clients' rights were not ripe. However, the court also stated, "We must emphasize that we express no view as to whether a public defender would have standing to assert the rights of his clients if the clients' claims were ripe." *Id. at 904.*

Thus, Defendants were inaccurate when they alleged that "the Ninth Circuit rejected Portman's claim that he had no standing to assert the Sixth Amendment rights of his clients." (Dfts' Mot. to Dis. at 5). The *Portman* decision was based on ripeness, not standing.

In *Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976),* the Supreme Court applied the *jus tertii* doctrine to hold that the plaintiff doctors had standing to challenge a statute that prohibited Medicaid funding for abortions that were not medically indicated. In the lead opinion, the Court easily determined that the doctors suffered concrete injury by operation of the challenged statute since the doctors had been refused payment for their abortion services and expected future refusals to follow. "If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions." *Id. at 113.*

Next, the *Singleton* Court determined that the rights of women who desired Medicaid-funded abortions was inextricably bound up with the activities of the doctors.

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's **[*609]** exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade, 410 U.S. 113, 153-156, 93 S. Ct. 705, 726-728, 35 L. Ed. 2d 147.* Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.

Id. at 117.

Finally, and with respect to the third *jud tertii* criteria which must be satisfied, the Court found that women faced obstacles in asserting their own rights, including a chilling effect on assertion of their rights in order to protect their privacy. The women also faced imminent mootness to their claims. While acknowledging that such obstacles were not insurmountable, the court held: "But if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id. at 117-118.*

The Supreme Court has also held that lawyers have *jus tertii* standing to assert the constitutional rights of their clients. In *Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989),* the petitioner attorney's client had all of his assets forfeited because they were found to have been derived from drug-law violations. As a result, the client was unable to pay the petitioner attorney. The Court held that the petitioner had standing to argue that the failure to except attorney fees from the forfeiture statute infringed upon his client's Sixth Circuit rights. It reasoned that the petitioner had a financial stake in the outcome of the case, that the attorney-client relationship is "one of special consequence" and that the statute might have materially impaired the client's ability to exercise his constitutional rights. *Caplin* at 624, n. 3.

Likewise, in *U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990),* an attorney was found to have standing to advance the due process rights of his clients to have legal representation. The statute being challenged in that case was the Black Lung Benefits Act of 1972, which prohibited attorneys from receiving fees for representing claimants without approval of the Department of Labor. Before finding that the attorney had standing, the Court recognized that a litigant ordinarily must assert his or her own legal rights:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. *See Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954-958, 104 S. Ct. 2839, 2845-2848, 81 L. Ed. 2d 786 (1984)* (professional fundraiser given third-party standing to challenge statute limiting its commission to 25% as violation of clients' First Amendment right to hire him for a higher fee). A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle.

Triplett at 720.

Applying this Supreme Court precedent to the facts of this case, the Court finds that the Attorneys' interest in this matter is similar to that of the doctors in *Singleton*. Like the doctors in *Singleton* and the attorney in *Caplin*, the Attorneys assert that they have lost income as a result of the challenged practice and stand to lose more. And, contrary to Defendants' contention, the Attorneys need not prove they have a "legally cognizable injury" in order to have standing, if that term is meant to suggest that a plaintiff must always have a **[*610]** cause of action solely on the basis of his or her own rights. In *Powers, supra.*, the Supreme Court defined the necessary injury as "an injury in fact," meaning that the litigant must have a "sufficiently concrete interest in the outcome of the issue in dispute." *Powers* at 710-711, (citations and quotation marks omitted).

Thus, in *Craig v. Boren, 429 U.S. 190, 194, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976),* the plaintiff bar owner had standing

to assert the constitutional rights of her male customers under the age of 21. She did not allege a cause of action for any violation of her own rights. She alleged that, as a vendor, she was required to carry out the commands of the statute she challenged. Secondly, her failure to obey the statute could lead to sanctions and the loss of her license. The Court held that the plaintiff had standing and stated, "This Court repeatedly has recognized that such injuries establish the threshold requirements of a 'case or controversy' mandated by Art. III. *See, e.g., Singleton v. Wulff, supra, at 113, 96 S. Ct. at 2873* (doctors who receive payments for their abortion services are 'classically adverse' to government as payer) . . . ." *Craig* at 194.

It is significant that the *Craig* court cited the doctors' receipt of payment from the government as establishing the injury requirement of *jus tertii* standing in *Singleton*. Further, neither of the plaintiffs in *Caplin* or *Triplett* were found to have a "legally cognizable injury." Their injuries were their inability to collect the fees they desired. Notably, the *Triplett* court signaled that the loss of fees does not need to be attributable to an existing client. It stated that "[a] restriction upon the fees a lawyer may charge that deprives the lawyer's *prospective* client of a due process right to obtain legal representation falls with [the *jus tertii*] principle." *Triplett* at 720, (emphasis added).

Here, the Attorneys, who are listed as qualified to receive appointments from Michigan courts, receive payment from the State for their services. They have a significant concrete interest in the determination of indigent defendants' entitlement to the appointment of counsel for filing leave to appeal plea-based convictions.

Additionally, the Court finds that the Attorneys meet the second requirement for asserting *jus tertii* standing. The Attorneys have a close relationship to indigent defendants who are denied appellate counsel; and, the Attorneys are the

appellate counsel whose services are being denied. Furthermore, just as a woman cannot safely secure an abortion without a physician, indigent defendants need counsel to effectively present their appellate claims. This truism has been well recognized by the Supreme Court. In *Douglas v. People of State of Cal., 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963),* the Court noted that an indigent without counsel, "where the record is unclear or the errors are hidden, has only the right to a meaningless ritual." Likewise, the *Evitts v. Lucey, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985),* court emphasized that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."

Thus, just as "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against" a woman's abortion choice, *Singleton* at 117, a criminal appellate attorney is uniquely qualified to litigate the constitutionality of an indigent defendant's denial of appointed appellate counsel.

Finally, this Court finds that the third *jus tertii* criteria is met, inasmuch as indigent defendants are severely hampered in presenting their own challenges to the Act. As noted above, virtually every lay person needs the assistance of counsel to present a suitable appeal. *Evitts* at 393. This principle surely applies when the appellate issue is the constitutionality of the trial court's denial of appointed **[*611]** counsel for the filing of an application for leave to appeal.

Indeed, this case is distinguishable from *Singleton, Craig* and *Caplin* in a manner that deems the finding of *jus tertii* standing even more appropriate here. In *Singleton*, the Court found that women seeking abortions had obstacles to challenging the statute at issue but noted that those obstacles were not insurmountable. *Singleton* at 117. In his dissenting opinion in *Craig*, Chief Justice Burger noted that "there is here no barrier whatever to Oklahoma males 18-20 years of age

asserting, in an appropriate forum, any constitutional rights they may claim . . . ." *Craig* at 216. Finally, in *Caplin*, the Court found no obstacles to a criminal defendant asserting the Sixth Amendment rights challenged in that case. *Caplin* at 624, n. 3.

In contrast, indigent defendants denied appellate counsel face significant, insurmountable obstacles in bringing their own challenges to the Act. The lack of legal counsel has been recognized repeatedly by the Supreme Court as rendering appeals woefully ineffective, as will be discussed more fully below.

Accordingly, the Court holds that the Attorneys have standing under the doctrine of *jus tertii* to assert the due process and equal protection rights of indigent defendants who plead guilty or nolo contendere.

B. The Standing of the Indigents to Challenge the Act

Plaintiffs state it is only the Attorneys who challenge the Act, and not the Indigents. Therefore, the Indigents' standing to challenge the Act is not an issue. However, in dispute is whether *Younger v Harris* abstention and the *Rooker-Feldman* doctrine deprive the Indigents of standing to challenge the Defendants' practices.

C. *Younger v. Harris* Abstention

In *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*, the plaintiff was being prosecuted for violation of a California Criminal Syndicalism Act (the "CCSA") and filed an action in a federal district court to enjoin the prosecution. The district court held the CCSA unconstitutional and restrained the State from further prosecution of the plaintiff. The Supreme Court reversed. In *Zalman v. Armstrong, 802 F.2d 199, 201-202 (6th Cir. 1986)*, the bases for the *Younger* decision was explained as follows:

Younger v. Harris counsels a federal court against interfering with currently pending state criminal proceedings absent a showing of extraordinary circumstances. Underlying this rule are considerations of equity, comity, and federalism. *Younger, 401 U.S. at 43-45, 91 S. Ct. at 750-51.* See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718, 2723, 91 L. Ed. 2d 512 (1986).*] The equity component reflects 'the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' *Younger, 401 U.S. at 43-44, 91 S. Ct. at 750.* The comity component reflects 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Id. at 44, 91 S. Ct. at 750.* Finally, the federalism component reflects a 'sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' *Id. Younger* is thus designed **[*612]** to "'permit state courts to try state cases free from interference by federal courts,' ... particularly where the party to the federal case may fully litigate his claim before the state court.' *Hicks v. Miranda, 422 U.S. 332, 349, 95 S. Ct. 2281, 2292, 45 L. Ed. 2d 223 (1975)*

(*quoting Younger, 401 U.S. at 43, 91 S. Ct. at 750).*

To determine whether to abstain in a case pursuant to the *Younger* doctrine, there are three factors to consider: "1) whether a state proceeding is pending at the time the federal action is initiated; (2) whether an adequate opportunity is provided to raise the constitutional claims in the state proceeding; and (3) whether there are extraordinary circumstances which nevertheless warrant federal intervention." *Zalman* at 202. However, the *Zalman* court cautioned against mechanical application of those factors. "Indeed, as with any 'rule of law' it is incumbent upon a court to be sensitive to the concerns which animate that rule." *Id.*

1. Pending State Action

Turning to the first factor, Defendants argue that the Indigents all have ongoing criminal proceedings. Plaintiffs Tesmer and Schnell have appealed to the Michigan Court of Appeals. Plaintiff Carter continues to have a right to file a delayed application for leave to appeal. n3 "For purposes of the first requirement, a state prosecution is considered to be pending if as of the filing of the federal complaint not all state appellate remedies have been exhausted." *Mounkes v. Conklin, 922 F. Supp. 1501, 1511 (D.Kan.1996).* Therefore, Defendants argue, that all of the Indigents continue to have pending state actions for purposes of the *Younger* doctrine.

n3 Defendants state that Carter was denied appellate counsel on May 12, 1999 and that Michigan court rules allow delayed applications for leave to appeal for at least 12 months following entry of a final order. MCR 7.205(F)(3) and (F)(4).

Plaintiffs do not challenge Defendants' claim that Tesmer and Carter have pending State proceedings. Accordingly, the Court, finds that the first prong of the *Younger* doctrine is

satisfied and abstention may be required in the cases of Carter and Tesmer if the other two prongs are satisfied.

The Plaintiffs do dispute that Schnell has a pending action. Schnell's application for leave to appeal was denied by the Court of Appeals on April 1, 1999 and his request for rehearing was denied on May 25, 1999.

Under MCR 7.302, a delayed application for leave to appeal to the Supreme Court may not be filed more than 56 days after the Court of Appeals decision. More than 56 days have passed since the Court of Appeals denied Schnell's Motion for rehearing on May 25, 1999. Consequently, the Court finds that Plaintiff Schnell does not have a pending State action. Hence, the Court need not abstain from hearing Schnell's claim.

2. Adequate Opportunity to Raise Constitutional Claims in State Proceeding

Defendants cite *Moore v. Sims, 442 U.S. 415, 425-426, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979),* for the proposition that abstention is required unless a plaintiff shows that state law bars the presentation of his or her claims in the pending state action. They contend that the Indigents have an adequate opportunity to raise their constitutional claims in the State proceedings. Additionally, the Michigan Supreme Court is considering the issues raised in this action in *Bulger*.

Plaintiffs agree that Carter and Tesmer must show that state procedural law bars them from presenting their claims. However, they argue that the State law being challenged in this case precludes them from having a reasonable opportunity to present their claims. In support, they cite Supreme Court cases, such as *Evitts*, where the Court stated that "the services of a lawyer will for virtually every layman **[*613]** be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts* at 393.

Plaintiffs also rely upon *Mata v. Egeler, 383 F. Supp. 1091 (E.D.Mich. 1974).* That case pertained to a Michigan court rule in which the indigent defendant had a right to appeal to the Court of Appeals and to have appointed appellate counsel if he or she filed an appeal within 60 days. However, if the indigent defendant did not appeal within 60 days, the right to appeal was lost, as was the right to appellate counsel. Thereafter, the indigent defendant had a discretionary appeal only, and no right to counsel to perfect his or her application for leave.

Judge James Harvey of this Court granted the plaintiff's application for writ of habeas corpus, reasoning in part:

> 'Meaningful access' to this system is denied indigents: they are forced to travel this route without a vehicle. . . . Mata has not been assisted by counsel at any stage of appeal. Until an attorney scrutinizes the record and prepares argument for appeal, the Court of Appeals does not have an 'adequate basis on which to base its decision to grant or deny review.' Although the state procedure does not completely foreclose petitioner from presenting his claims to the Michigan appellate courts, depriving him of counsel at the initial review, simply because of his indigency, will degrade the entire appellate process to a 'meaningless ritual'.

Mata at 1094.

The Court agrees with Plaintiffs that it is State substantive law that compromises indigent defendants' ability to receive adequate protection from the challenged practice of denying them appellate counsel. The Michigan Court of Appeals has already upheld the constitutionality of the practice of denying the appointment of appellate counsel for the purpose of preparing application for leave to appeal. *People v. Najar, 229 Mich. App. 393, 581 N.W.2d 302 (1998).* Under MCR 7.215

(C)(2), "A published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*." While it is true that the mere fact that the *Najar* court's rejection of another defendant's constitutional claims does not itself suffice to establish that the Indigents are denied an adequate opportunity to present their challenge, in this case, the State law itself defeats indigent defendants' ability to adequately advance their constitutional claims through counsel.

This finding, however, applies only to Carter. In a declaration, he stated that he did not appeal to the Court of Appeals because he did not have a lawyer to represent him and he did not know the law (Plt's Resp. to Mot. to Dis., Exh. A). In contrast, Tesmer did file for leave to appeal. His 38 page Delayed Application for Leave to Appeal Denial of Counsel is attached as Exhibit 1 to Defendants' Motion. He and Schnell appear to be one of many indigent defendants who received the form brief (see Schnell's Br. at Dft's Mot., Exh. 2). Their briefs are identical except that the fill-in-the-blank cover and signature pages include their individual information. Tesmer's lawyerly brief undermines his claim, and this Court is satisfied that Tesmer has had an adequate opportunity to challenge the denial of appellate counsel in the state proceeding. Thus, *Younger* requires abstention in this regard.

3. *Extraordinary Circumstances*

Having made the above findings, Plaintiff Tesmer is the only remaining Plaintiff of the Indigents to whom the "extraordinary circumstances" analysis is meaningful. And, the Court finds that there are no extraordinary circumstances which preclude abstention under the *Younger* doctrine for Tesmer. In *Younger*, the Court cited "bad faith and harassment" and "a statute [that is] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made **[*614]** to apply it" as examples of when abstention may not be justified. *Younger* at

53-54, (citation and quotation marks omitted). Plaintiffs argue that the Act and the challenged practice of the Judges are flagrantly and patently unconstitutional. However, Plaintiffs' cite no cases which support this contention. There may be none, because the exception is interpreted to be so narrow.

> The requirement that a statute must be unconstitutional in every 'clause, sentence and paragraph, and in whatever manner' it is applied, demonstrates that this exception to *Younger* abstention is very narrow. The refusal to apply the exception in the *Younger* case, itself, illustrates the narrowness of this exception: in *Younger*, the federal plaintiff could not bring himself within this exception even though the statute under which he was indicted--the California Criminal Syndicalism Act--had been effectively invalidated the previous year in *Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969) (overruling Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)). Younger, 401 U.S. at 40-41, 91 S. Ct. at 748-749.*

Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles, 23 F.3d 218, 225 (9th Cir. 1994).

Further, Plaintiffs have not shown that Tesmer faces great and immediate irreparable injury, which is required in order for there to be a finding of extraordinary circumstances. *See Zalman* at 205, n. 8. The *Younger* Court stressed that requirement.

> In view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is both great and immediate. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal

> prosecution, could not by themselves be considered irreparable in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Younger at 46.

Tesmer makes no showing that he faces threat of injury that is greater than any other criminal defendant facing prosecution who, in the context of that litigation, alleges a violation of federally protected rights. Therefore, even if the Act and practice of the Judges are flagrantly unconstitutional, extraordinary circumstances do not exist to interfere in the State court proceedings involving Tesmer.

4. Conclusion Regarding Younger Abstention

The Court concludes that the *Younger* doctrine does not bar the Attorneys or Schnell from pursuing this case because they do not have any pending State actions. Further, Carter has not had an adequate opportunity to challenge the practice and State law that led to the denial of his request for appellate counsel. Without counsel, Carter's appeal of that decision would have been a "meaningless ritual." Finally, no extraordinary circumstances exist which would allow the Court to interfere in the State court action pending with respect to Tesmer.

D. The *Rooker-Feldman* Doctrine

The general rule established by *Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149,* (1923) and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)* is that federal district courts do not have appellate jurisdiction over State court decisions. District courts are vested only with original jurisdiction. *Rooker* at 415-416; *Feldman* at 482-486.

> This rule arises from the interplay of two jurisdictional statutes: *28 U.S.C. § 1331*, which grants district courts original jurisdiction over 'civil actions arising under' federal law, and *28 U.S.C. § 1257*, which grants the Supreme Court the right to review 'final judgments ... **[*615]** rendered by the highest court of a State.' This rules applies even when the state court judgment is not made by the highest state court, *Worldwide Church of God v. McNair, 805 F.2d 888, 893 n. 3 (9th Cir.1986)*, and when the challenge to the state court's actions involves federal constitutional issues. *Feldman, 460 U.S. at 484-86, 103 S. Ct. at 1316-17.*

Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles, 23 F.3d 218, 221 (9th Cir.1994).

Defendants argue that, under the *Rooker-Feldman* doctrine, this Court lacks jurisdiction to review the merits of the State court decisions denying the Indigents' requests for appellate counsel.

There is, however, an important exception to the *Rooker-Feldman* doctrine, which was explained in *Dubinka* as follows:

> Although a federal district court does not have jurisdiction to review constitutional challenges to a state court's decision, the court does have jurisdiction over a general constitutional challenge that does not require review of a final state court decision in a particular case. [*Feldman*] *460 U.S. 462, 482-86, 103 S. Ct. 1303, 1314-17, 75 L. Ed. 2d 206;* [*Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986)]*. 'This distinction between a permissible general constitutional challenge and an impermissible appeal of a state court determination may be

> subtle, and difficult to make.' *McNair, 805 F.2d at 891* (citations omitted).
>
> In analyzing whether federal district courts have jurisdiction to hear a particular constitutional challenge, we must determine whether the constitutional claims are 'inexplicably intertwined' with the state court's rulings in a particular plaintiff's state case. *Feldman, 460 U.S. at 483-84 n. 16, 103 S. Ct. at 1315-16 n. 16* (stating that 'if the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision'); *see also McNair, 805 F.2d at 892*. Courts have generally concluded that claims are inextricably intertwined when the district court must scrutinize both the challenged rule and the state court's application of that rule.

Dubinka at 221-222.

Here, the Indigents request that the Court consider the constitutionality of the State court's general practice of denying appellate counsel following plea-based convictions. The particularities of their cases are not at issue. While Plaintiffs in their Complaint cite the specific dates and judges who denied them appellate counsel, resolution of Plaintiffs' claims only requires the Court to scrutinize the challenged rule, not the state court's application of that rule to any individual Plaintiff's case. Plaintiffs' constitutional claims are, therefore, not inextricably intertwined with the state court's denial of appointed counsel to these Plaintiffs and the *Rooker-Feldman* doctrine does not apply. *Dubinka* at 221-222.

* * *

Thus, the Court finds that the Attorneys have standing and, further that this Court has jurisdiction to hear the constitutional challenge brought by the Indigents. However, this holding is limited to Carter and Schnell, since the *Younger* doctrine applies to Tesmer. Finally, since the Attorneys did not have a State proceeding, the *Rooker-Feldman* doctrine does not apply to them, and they may proceed in this action.

E. The Proper Defendants

Defendants argue that there are no proper Defendants in this case. They argue that the Eleventh Amendment bars suit against the Attorney General in her official capacity. n4 Nor does *Ex Parte* **[*616]** *Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908),* apply to Plaintiffs' request for injunctive relief against the Attorney General, Defendants argue.

> Under *Young*, individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. . . .
>
> Courts have not read *Young* expansively. Young does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute.

Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1414-1415 (6th Cir. 1996) (citations omitted).

n4 Defendants also argue that the Attorney General cannot be sued in her personal capacity. This argument is not reviewed in this memorandum because Plaintiffs filed suit against the Attorney General only in her official capacity and they do not argue in response to Defendants' Motion that she is personally liable.

Defendants allege that the Attorney General has no relation to the Act and will have absolutely nothing to do with enforcing it. The Court agrees with Defendants.

The enforcement of the Act is not a law enforcement or prosecutorial function. The Act is directed at the trial court. The Court sees no indication that the prosecutor has any input into the trial court's consideration of the merits of appointing counsel. The hypothetical chance that the Attorney General could file an application for superintending control over a trial court which violates the Act, as Plaintiffs suggest might happen, is far afield from the requirement that the state official being sued have threatened to enforce the challenged statute. The Attorney General is not a proper party.

However, the Court finds that the Judges and the putative class of Circuit Court Judges are proper Defendants. They are the State officials charged with enforcing the Act. That they will be enforcing the Act is clear; a March 28, 2000 amendment to Michigan Court Rules 6.302, 6.425 and 6.615 and the adoption of Michigan Court Rule 6.625, are all aimed at implementing the Act (See Exh. A of Plts' Supp. Auth.).

Whether the Judges are neutral adjudicators, as Defendant suggest, or acting in an administrative capacity, when they consider the appointment of counsel, as Plaintiffs contend, is not of any consequence for purposes of this action.

Regardless of the characterization of the role they play when denying appellate counsel to indigent defendants, the Judges are proper parties. This finding is supported by *Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984),* a case with striking parallels to the instant one. In *Pulliam*, a magistrate judge jailed two defendants who could

not post bail even though they were arrested for non-jailable misdemeanors. Afterwards, the defendants filed a § 1983 claim against the magistrate, seeking declaratory and injunctive relief. They claimed that the magistrate's practice of requiring bond for nonincarcerable offenses violated the due process and equal protection clauses. The trial court agreed and enjoined the practice.

On appeal to the Supreme Court, the issue concerned, in relevant part, "the scope of judicial immunity from a civil suit that seeks injunctive and declaratory relief under § 1 of the Civil Rights Act of 1871 . . . ." *Pulliam 466 U.S. at 524.* After an exhaustive review of English and American law, the Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam 466 U.S. at 541-542.* Moreover, the Court emphasized that § 1983 was intended to reach unconstitutional actions of judges. The Court cited *Pierson v. Ray, 386 U.S. 547, 558-564, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967),* as standing for the proposition that "every Member of Congress who spoke to the issue assumed that **[*617]** judges would be liable under § 1983." *Pulliam 466 U.S. at 540.*

> Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges. In *Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880),* § 4 of the Civil Rights Act of 1875, 18 Stat. 336, was employed to authorize a criminal indictment against a judge for excluding persons from jury service on account of their race. The Court reasoned that the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the equal protection of the laws. **Since a State acts only by its legislative, executive, or judicial authorities, the constitutional provision must be addressed to**

> **those authorities, including the State's judges.** Section 4 was an exercise of Congress' authority to enforce the provisions of the Fourteenth Amendment and, like the Amendment, reached unconstitutional state judicial action.
>
> The interpretation in *Ex parte Virginia* of Congress' intent in enacting the Civil Rights Acts has not lost its force with the passage of time. In *Mitchum v. Foster*, supra, the Court found § 1983 to be an explicit exception to the anti-injunction statute, citing *Ex parte Virginia* for the proposition that the 'very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."' *407 U.S. 225, 242, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705.*
>
> Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation. We remain steadfast in our conclusion, nevertheless, that **Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.**

Pulliam 466 U.S. at 540-541. (emphasis supplied)

Like the jailed defendants in *Pulliam*, the Indigents are suing under § 1983, asserting that the Judges' practices violate their due process and equal protection rights. In light of

Pulliam, Defendants' argument that the Judges are not proper Defendants in this case cannot be sustained. Furthermore, *Pulliam's* emphasis on the fact that § 1983 was intended to be an independent protection for federal rights undermines Defendants' claim that an indigent defendant's only recourse is to appeal the denial of appellate counsel and, when those appeals are exhausted, file a petition for writ of habeas corpus.

In addition, the Court believes that the Judges are proper Defendants because of their role as enforcers of a common law rule which precludes indigent defendants from being assigned appellate counsel after plea based-convictions, and as enforcers of the Act, soon to take effect. The Supreme Court has held that, when judges act as enforcers, they are subject to § 1983 suits for injunctive or declaratory relief.

> If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 20* **[*618]** *L. Ed. 646 (1872),* we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial

immunity bars declaratory or injunctive relief; we have not addressed the question.

We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975),* is only one of a myriad of such cases since *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),* decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.

Supreme Court of Virginia v. Consumers Union of U. S., Inc., 446 U.S. 719, 734-737, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980)(citations omitted).

Under the Act, Michigan's circuit court judges will be solely responsible for enforcing the laws regarding the appointment of appellate counsel to indigent defendants who have pled guilty or nolo contendre. If the circuit court judges cannot be sued for relief, putative Plaintiffs would have to await the institution of state-court proceedings against them and the denial of appellate counsel in order to assert their federal constitutional claims. "This is not the way the law has developed, and, because of [their] own inherent and statutory enforcement powers, immunity does not shield the [the Judges] from suit in this case." *Supreme Court of Virginia* at 737.

Accordingly, the Court holds that the Judges and the putative class of Michigan circuit court judges are proper Defendants in this case.

F. Available Relief Against the Judges

In this 42 USC § action Plaintiffs' request both declaratory and injunctive relief. However, injunctive relief against the Judges is not available. Following the decision in *Pulliam*, § 1983 was amended to provide that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Since no declaratory decree has been violated and declaratory relief is available, the Court cannot enter an injunction against the Judges. However, under the plain wording of *42 USC § 1983,* declaratory relief against judicial officers is clearly available if the circumstances warrant such relief.

G. Declaratory Judgment

The Court finds that both the challenged practice of denying appellate counsel to indigent defendants who plead **[*619]** guilty or nolo contendere, as well as the Act, violate the United States Constitution.

The Supreme Court has held that denial of counsel on appeal to an indigent amounts to invidious discrimination. The starting point of the analysis was the Court's finding that "[a] State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas v. People of State of Cal., 372 U.S. 353, 354, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963).* Applying that general rule, the Court found that "there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Id.*, (citation and quotation marks omitted).

In *Douglas*, the State court denied the defendants' requests for counsel after determining that no good would be served by the appointment of counsel. The state court acted pursuant to a State statute that allowed the court to review the record and determine whether appellate counsel would be helpful. The Supreme Court rejected that approach.

> In spite of California's forward treatment of indigents, under its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether o. not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion

on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an *ex parte* examination of the record that the assistance of counsel is not required.

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike (Cal.Penal Code § § 1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction (see Cal.Const., Art. VI, § 4c; Cal.Rules on Appeal, Rules 28, 29), or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Douglas at 355-357, (citations omitted).

The *Douglas* court further emphasized that an indigent who is required to defend himself is rendered utterly defenseless.

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened **[*620]** by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Douglas at 357-358.

The *Douglas* decision was followed by *Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).* The *Ross* court distinguished its case from *Douglas* and held that North Carolina was not required to appoint counsel to file a discretionary appeal to the State's highest court or to the U.S. Supreme Court. In so holding, the Court emphasized in three instances that the defendants in that State were appointed counsel for their appeals to the intermediate appellate court.

> The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.' *Douglas v. California, 372 U.S. at 356, 83 S. Ct. at 816.* We do not believe that it can

> be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

Ross at 614-615.

> Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.

Id. at 615.

> An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*.

Id. at 616.

In *Mata, supra,* discussed earlier, this court applied *Douglas* and *Ross* to hold a portion of Michigan's then existing appellate rules unconstitutional. The rules deemed first appeals to the Court of Appeals to be as of right so long as they were requested within 60 days. Indigent defendants who timely filed requests for appeal were entitled to the appointment of appellate counsel. Anyone failing to request appeal within 60 days lost his or her right to appeal but could file for leave to appeal. Additionally, the right to appointed appellate counsel for indigents was lost when the request for appeal was untimely. The *Mata* petitioner did not file his request to appeal timely and, therefore, his request for appointed appellate counsel was denied.

[*621] Despite the fact that the petitioner's appeal to the Court of Appeals was discretionary, the *Mata* court distinguished its case from *Ross*. Unlike in *Ross*, where the defendants had already received appellate counsel during the intermediate appeal, the *Mata* petitioner had "not received the assistance of counsel at any stage of the appellate process." *Mata* at 1093. No attorney had scrutinized the record and prepared an argument for appeal. *Mata* at 1094. The court continued:

> It is 'invidious discrimination' for the Michigan Court of Appeals to consider the merits of an indigent's first late appeal without benefit of counsel while allowing a rich man to employ counsel. The 'relative handicap' Michigan indigents face when applying for leave to appeal is even greater than the handicap petitioners faced in *Douglas*. There, the California appellate court independently examined the record before

concluding that 'no good whatever could be served by appointment of counsel.' *372 U.S. at 355, 83 S. Ct. at 815.* Here, the only person examining the record for possible errors is petitioner-- an indigent untrained in law. Furthermore, Mata's appeal is discretionary rather than as of right; if he fails to persuade the Court of Appeals his case has merit, he will not receive his first appeal, as petitioners in *Douglas* would have. **While one can distinguish the principal case from *Douglas*-- the appeal in the principal case is discretionary, whereas in Douglas it was as of right-- in the context of the Michigan appellate system, this is a distinction without a difference.** Whether the appeal is as of right or discretionary is irrelevant if 'indigents are . . . denied meaningful access to that system because of their poverty.' *Ross v. Moffit, 417 U.S. at 611, 94 S. Ct. at 2444, 41 L. Ed. 2d at 351.*

Mata at 1093-1094. (emphasis supplied)

Consistently with the *Mata* court, the Court holds that the practice of the Judges and similarly situated judicial officers, which denies appellate counsel to indigent defendants with plea-based convictions, is unconstitutional. Such practice, codified in the Act slated to soon take effect, is unconstitutional for the same reasons. Defendants emphasize that the *Douglas* and *Ross* Courts distinguished between appeals of right and discretionary appeals. However, in holding that a State need not appoint appellate counsel for a discretionary appeal to the State's highest court, the Supreme Court could not have been more clear that that distinction was based upon the fact that an attorney had been appointed at the intermediate level, had reviewed the record and had prepared the appellate arguments. Without that initial review by an

attorney, the indigent defendant's appeal was a meaningless ritual.

The Supreme Court also made clear in *Douglas* and *Ross* that, when a rich man is given a meaningful opportunity to appeal while a poor man is given only a meaningless ritual, that is invidious discrimination.

Defendants stress the fact that the indigent defendants who are denied appellate counsel have pled guilty. The implication is that, by admitting guilt, the indigent defendants do not need to have a meaningful appeal available to them. The Court rejects this argument. An illustration of the serious injustice that could occur when an indigent defendant who has pled guilty is denied appellate counsel was described in *Mata*.

> At the Center for Forensic Psychiatry in Ann Arbor, Michigan, three doctors examined Mata for nearly two months before concluding he was incompetent to stand trial. Despite this report, the trial judge accepted a local doctor's conclusion of competence that was based on an hour and fifty-minute interview with Mata. In addition to maintaining he was incompetent to stand trial, petitioner argues with some force that he received incompetent assistance of counsel. Assuming *arguendo* these contentions have merit, petitioner's only chance for justice **[*622]** within the Michigan legal system rests on his obtaining an effective appeal.

Mata at 1094.

Therefore, the fact that the indigent criminal defendants at issue have or will have pled guilty or nolo contendere does not justify the policy of denying them a meaningful appeal.

IV. Conclusion

For the above reasons, the Court finds that the attorneys have established *jus tertii* standing; that *Younger* requires abstention with respect to Tesmer's claim only, and not the other Indigents or the Attorneys; that the *Rooker-Feldman* doctrine is applicable; that the Attorney General is not a proper Defendant, but the Judges and the putative class of circuit court judges are. These findings result in Defendants' Motion to Dismiss being granted in part and denied in part.

Further, for the reasons stated above, this Court is prohibited from enjoining the Judges and the putative class of circuit court judges by operation of § 1983. Hence, Plaintiffs' Motion for Preliminary Injunction is denied.

Finally, this is a proper case for entry of a Declaratory Judgment under Fed. R. Civ. P. 57 and *28 U.S.C. § 2201.* Accordingly:

1. The practice of the Judges and other similarly situated State of Michigan circuit court judges, of denying appointed counsel to aid indigents seeking leave to appeal their plea-based felony conviction or nolo contendere, is declared to be in violation of equal protection and due process requirements of the United States Constitution; and

2. P.A. 1999, No. 200, which codifies the above practice, is declared to be in violation of equal protection and due process requirements of the United States Constitution.

IT IS SO ORDERED.
/S/
Victoria A. Roberts
United States District Judge

Dated: 3/31/00

UNITED STATES DISTRICT COURT
For The EASTERN DISTRICT Of MICHIGAN,
NORTHERN DIVISION

CASE NO. 00-CV-10082

114 F. Supp. 2d 622; 2000 U.S. Dist. LEXIS 17060

JOHN CLIFFORD TESMER, CHARLES CARTER and ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals, and ARTHUR M. FITZGERALD and MICHAEL D. VOGLER, Plaintiffs,

v.

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE and JUDGE LYNDA HEATHSCOTT, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges, Defendants,

June 30, 2000, Decided
June 30, 2000, Filed

Judges: Hon. Victoria A. Roberts, United States District Judge.

[*624]

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR INJUNCTION AND DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

I.

This matter is before the Court on Plaintiffs' Motion for Injunction filed May 9, 2000, and Plaintiffs' Motion for Class Certification, filed March 30, 2000. Plaintiffs request that the Court issue an injunction to enforce its prior declaratory judgment, which held that the denial of appellate counsel to indigents who have pled guilty or nolo contendere is unconstitutional. Additionally, they ask this Court to certify a class of circuit court judges similarly situated to the named Defendants. The parties have filed briefs, and, on Wednesday, June 28th, 2000, the Court heard argument. For the reasons explained below, Plaintiffs' Motion is **GRANTED**. Additionally, Judge Kolenda and all other similarly situated non-party judicial officers are bound by the present injunction, Fed. R. Civ. P. 65(d). Accordingly, Plaintiffs' Motion for Class Certification is **DENIED.**

II.

As a preliminary matter, this Court must consider whether it has jurisdiction to consider Plaintiffs' Motions. Defendants question the Court's authority in light of the fact that they have appealed the prior order to the Sixth Circuit Court of Appeals. Plaintiffs argue that Defendants have appealed an order that does not exist, inasmuch as their appeal concerns an "injunction," and this Court only entered a declaratory judgment. Because they claim the appeal is invalid, they encourage the Court to find jurisdiction.

The Court is mindful of the fact that an appeal generally divests the district court of jurisdiction over those aspects of the case which are involved in the appeal. *Griggs v. Provident Consumer* **[*625]** *Discount Co., 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 (1982).* However, *Griggs* is "not an inflexible rule." *Cochran v. Birkel, 651 F.2d 1219, 1223 (6th Cir. 1981).* For example, a district court may proceed where "the order from which the appeal is sought is itself clearly nonappealable," *id. at 1222,* or "manifestly deficient." *Id. at 1222* (quoting *Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.*

1972). As such, there is reason to believe that the Court retains jurisdiction under the present circumstances.

Nonetheless, the Court finds it may assert jurisdiction without deciding whether Defendants' appeal meets the standards established in *Griggs*. The Court has the power to proceed with Plaintiff's Motions under the Declaratory Judgment Act, *28 U.S.C. § 2202.* That act allows the Court to grant "further necessary or proper relief based on a declaratory judgment . . . against a party whose rights have been determined by judgment." *28 U.S.C. § 2202.* Since Plaintiffs' rights have been determined in this Court's prior Order, this Court may continue to grant such relief as necessary to protect those rights.

III.

On March 31, 2000 this Court issued an Opinion and Order (1) Granting in Part and Denying in Part Defendants' Motion to Dismiss, (2) Denying Plaintiffs' Motion for Preliminary Injunction; and (3) Granting Plaintiffs' Request for Declaratory Judgment. At issue before the Court was the constitutionality of P.A. 1999, No. 200 ("the Act") and the practice of some Michigan judges of denying appellate counsel to indigents who have pled guilty or nolo contendere, for the purpose of preparing applications for leave to appeal their plea based convictions and sentences. The Court declared, in no uncertain terms, that the denial of counsel in such cases rendered an indigent defendant's appeal a meaningless ritual and was, therefore, unconstitutional. *See March 31st Opinion and Order* at 33-39. It specifically stated that the Act denied equal protection and due process to indigent defendants and similarly declared the challenged practices "of the judicial officer Defendants and other similarly situated state circuit court judges" unconstitutional.

Despite the March 31st Opinion and Order declaring the Act and practice unconstitutional, Defendant Heathscott

continues to refuse to appoint appellate counsel to indigents who have pled guilty. Defendant Heathscott relies on her stated obligation to follow M.C.R. 6.425, a newly enacted Michigan Supreme Court rule designed to implement the Act that this Court declared unconstitutional. n1 Further, at oral argument, counsel for Judge Heathscott argued that Judge Heathscott had not violated this Court's declaration with respect to Plaintiffs, and that she was only failing to appoint counsel to criminal defendants who are not parties to this action.

> n1 The Michigan State Supreme Court Rule came to the Court's attention by way of Plaintiffs' supplemental brief, submitted March 27, 2000..

Additionally, Judge Dennis Kolenda refuses to appoint appellate counsel, relying upon the fact that he was not a party to the original action. Judge Kolenda does concede that he had notice of this Court's Declaratory Judgment. (Plaintiffs' Motion for Issuance of an Injunction, at 4, citing Judge Kolenda's opinion in *People v. Hill*, No. 99-12376-FH (Kent Cir. Ct. Apr. 24, 2000)).

For the reasons stated below, the Court grants Plaintiffs' Motion for Injunction against Judge Heathscott. *28 U.S.C. § 2202; 42 U.S.C. § 1983;* Fed. R. Civ. P. 65. Additionally, the Court cautions that Judge Kolenda and all other similarly situated non-party judicial officers are also bound by the present injunction. Under Fed. R. Civ. P. 65 (d), an injunction is binding not only on the parties to the action, but also upon "those persons in active participation with them who receive actual notice of the order by personal service or otherwise." Thus, the Court finds it unnecessary to grant Plaintiffs' request to certify a class of circuit court judges similarly situated to the named Defendants.

III.

Plaintiffs request that the Court issue an injunction against both Judges Heathscott and Kolenda, and further request that the Court grant their Motion to Certify a Class of circuit court judges similarly situated with respect to the named Defendants. The Court addresses each argument in turn.

A.

Upon review of the actions of Defendant Heathscott, the Court finds that a § 1983 injunction is appropriate. The authority to grant injunctive relief is conferred by *42 U.S.C § 1983,* which could not be clearer that such relief is available once a declaratory decree has been violated. Additionally, the Declaratory Judgment Act, *28 U.S.C. § 2201 et seq.*, allows this court to grant "further necessary or proper relief based on a declaratory judgment . . . against a party whose rights have been determined by judgment." *28 U.S.C. § 2202.* Although injunctive relief against a state Court Judge is rarely awarded, "there is no immunity bar to such relief, and in situations where, in their judgment, an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted relief." *Pulliam v. Allen, 466 U.S. 522, 537, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984).* In particular, "when no state proceeding is pending, the considerations of equity, comity and federalism are [] diminished, [and] a federal court may . . . grant declaratory and injunctive relief." *WXYZ, Inc. v. Hand, 658 F.2d 420, 423 (6th Cir. 1981)* (citing *Steffel v. Thompson, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974)); Wooley v. Maynard, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977).*

While this Court, as many other federal courts, is reluctant to interfere with the functions of a state court, there is no state court action pending which would determine the constitutionality of the Act. *See* Plaintiffs' Supplemental Authority, Concurring Opinion of Corrigan J. ("The constitutionality of *1999 P.A. 200* is not before us in *[People*

v.] Bulger."). Meanwhile, Judge Heathscott continues to act "under color of [a] regulation . . . in [subjecting persons] to the deprivation of . . . rights . . . secured by the Constitution . . . ." *42 U.S.C. § 1983.* She does not contest that she continues to fail to appoint counsel to indigent criminal defendants who have entered guilty or nolo contendere pleas, contrary to this Court's declaration that such a practice violates the equal protection and due process requirements of the United States Constitution.

Further, while Defendant Heathscott apparently claims she is merely following a court rule that was not examined by the Court when it issued its March 31st Order, this argument does not immunize her actions. The Michigan court rule upon which she relies, M.C.R. 6.425, is specifically designed to implement the Act that this Court's Order clearly declared unconstitutional. *See Order* at 3 ("Additionally, the Court declares that *1999 P.A. 200* . . . is unconstitutional in that it denies equal protection and due process to indigent individuals who have pleaded guilty or nolo contendere."); *see also* Objections to implementation of court rules by Justices Cavanagh and Kelly, attached to Plaintiffs' Supplemental Authority (criticizing the Michigan Supreme Court's rush to amend the court rules to reflect the standards proposed in the Act). As such, the Michigan court rule conflicts with federal law and is "without effect" under the Supremacy Clause of the United States Constitution. n2 U.S. Const. art. VI; *McCulloch v.* **[*627]** *Maryland, 17 U.S. (4 Wheat.), 316, 4 L. Ed. 579 (1819)* (any state law that conflicts with federal law is "without effect."). Defendant Heathscott, therefore, cannot shield her actions from review by relying on a state procedural rule that indisputably conflicts with federal law. n3

> n2 The Court notes that this is not a situation where a state court has made its own independent review of the constitutional questions decided by this court. As such, there is no claim made that Judge Heathscott is not bound in light of the parallelism between state courts and lower federal courts. *See Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992)* ("'In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position.").
>
> n3 Further, under the authority of *28 U.S.C. § 2202,* this Court also clarifies that its declaratory judgment extends to all procedural rules designed to implement the statute declared unconstitutional.

Additionally, the Court is troubled by the disingenuous arguments made by Judge Heathscott to insulate herself from the clear remedial provisions set forth in § 1983 against judicial officers. In reviewing those same provisions, the United States Supreme Court found no indication of affirmative congressional intent to insulate judges from the reach of the remedy Congress provided in 1983. *Pierson v. Ray, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967).* As the High Court has further explained:

> Congress enacted 1983 . . . to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. . .
>
> Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges.

Pulliam, 466 U.S. at 540 (internal quotations and citations omitted). While the Court acknowledged that "much has changed since the Civil Rights Acts were passed," *id.*, it also stated:

> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common- law doctrine of judicial immunity to insulate state judges completely from federal collateral review.

Id. at 541.

The Court is mindful of Defendant's argument that it should act with restraint. However, the Court cannot shirk its obligation to exercise its jurisdiction on behalf of litigants to assure their right to due process and the equal protection of the laws. "The very purpose of section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action, under the color of state law, whether that action be executive, legislative or judicial." *Id.* (quoting *Mitchum v. Foster, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972)).* This Court will do precisely that, even though the result may be to enjoin a state court judge, or even to hold her in contempt for continued violations. *Pulliam, 466 U.S. at 538 n. 19.*

B.

The Court also finds that Judge Kolenda is bound by this injunction, in spite of the fact that he was not a named party in the original declaratory decree. "A court may bind non- parties to the terms of an injunction or restraining order to preserve its ability to render a judgment in a case over which it has jurisdiction." *United States v. Paccione, 964 F.2d 1269, 1274-*

75 (2nd Cir. 1992). Indeed, Fed. R. Civ. P. 65(d) specifically provides that an injunction is binding "upon those persons in active concert or participation with [the parties] who receive actual notice of the order . . . ." Fed. R. Civ. P. 65(d) extends to those who participate with the named defendants even where the non-parties "were independently motivated." *New York State Nat'l Organization for Women v.* **[*628]** *Terry, 961 F.2d 390, 397 (2d Cir.1992), vacated on other grounds, 507 U.S. 901 (1993).*

In the present case, it is undisputed that Judge Kolenda received actual notice of the March 31st Opinion and Order, as he specifically cited it to it and stated his disagreement with it. See Exhibit B to Pl's Motion for Injunction. Further, in finding that the criminal defendant was not entitled to appellate counsel, Judge Kolenda participated with the named Judges who adopted the practices declared unconstitutional by this Court, even as he cited his own independent motivations for doing so. As such, the Court finds it necessary to bind Judge Kolenda by means of an injunction to preserve its prior Order.

Further, the Court concludes that it may validly issue a § 1983 injunction against Judge Kolenda even though he was not a party to the original action. The 1996 amendments to § 1983 indicate that an injunction may issue against a judicial officer when "a declaratory decree was violated . . . ." *42 U.S.C. § 1983.* In the present case, Plaintiffs obtained a declaratory decree, and its terms were violated by Judge Kolenda. As such, it appears that Plaintiffs are entitled to an injunction against him.

In so concluding, the Court is mindful that the issue of whether an injunction can issue with respect to those judicial officers not parties to the prior declaratory decree, is not clear cut. The statute is somewhat vague, the legislative history is ambiguous and the issue appears to be one of first impression. However, following the general rules of statutory construction, the Court notes that the plain language of the statute requires

only "a" declaratory decree. Had Congress intended to require plaintiffs to obtain a separate declaratory decree with respect to each judicial officer against whom an injunction was sought, it could have easily specified as much. In particular, Congress could have easily stated that injunctive relief should not issue unless a judicial officer violated a declaratory decree against him/her.

Further, the Court finds that simply requiring one declaratory decree best enforces the purposes *42 U.S.C. § 1983*. As explained *supra*, § 1983 was intended to prohibit state courts from being used to deprive individuals of their federal rights. It was intended to interpose the federal courts between the states and the people, as guardians of the people's federal rights. Moreover, the Supreme Court has consistently held that Congress did not intend to immunize judicial officers. Thus, once a state judicial practice is declared unconstitutional, such declaratory decree should serve as a basis for injunctive relief against any judicial officer violating its provisions. To rule otherwise would potentially require individuals like Plaintiffs to file numerous suits for declaratory decrees against several judges on the same issue, or to seek to amend their complaints repeatedly each time another judicial officer violated the terms of a decree. It would, therefore, require a significant expenditure of time and resources, and would impose a significant burden on efforts to protect against deprivations of constitutional rights. Thus, while the Court is concerned with comity and respects the ability of state judges to pass on federal constitutional questions, it concludes that the balance of considerations in the present case weighs in favor of requiring only "a" declaratory decree.

C.

Plaintiffs additionally urge this Court to consider their Motion for Class Certification, since Judge Kolenda relies upon this Court's failure to certify a class as a justification for not following the Order. As an initial matter, the Court would

expect that Judge Kolenda and other state court judges would refrain from engaging in their own analysis, since this Court's prior Order specifically declared unconstitutional the "practice of the Judges and other similarly situated State of Michigan **[*629]** circuit court judges . . . ." *March 31st Opinion and Order* at 2, 40. While the Court stopped short of formally certifying the class of circuit judges under Fed. R. Civ. P. 23, the decision clearly indicated the Court's inclination to do so.

At the present time, however, the Court declines Plaintiffs' request to certify the class. As the Court noted earlier, this matter is now on appeal. While the Court recognizes its authority to enforce its declaratory decree, it is not yet satisfied that certifying a class constitutes enforcement, as opposed to expansion, of its prior Order. Further, the Court again notes that under Fed. R. Civ. P. 65(d) any non-party who acts in "concert or participation with [the parties]" and who receives actual notice of this injunction, is bound by its terms. Between the specific language of this Court's March 31st Opinion and Order, and the language of Rule 65(d), the Court is hopeful that all other non-party judges will abide by its ruling unless and until it is overturned by a higher federal court. As such, the Court concludes that further relief in the form of class certification is not warranted.

IV.

It is unfortunate that the defiance of certain state court judges has led to the need for this request for extraordinary relief against judicial officers. The paucity of cases addressing the issues set forth in Plaintiff's Motion suggests that the overwhelming majority of judges do abide by federal court orders that are designed to enforce the United States Constitution. The state judges who choose to enforce statutes declared to be unconstitutional should appreciate that their acts of defiance will certainly carry costs, not the least of which is the erosion of respect among parallel courts. If necessary, the Court will not hesitate to *sua sponte* certify a class of state

circuit judges if is later satisfied that such action is necessary to further enforce the March 31st Opinion and Order. *Barrientos v. Nichter, 76 F. Supp. 2d 510, 516 (S.D.N.Y. 1999)* ("District courts may rule on class certification sua sponte."); *McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir.1981); see also Shipp v. Tennessee Dept. of Employment Security, 581 F.2d 1167, 1169 (6th Cir. 1978)* (noting that the district court did not certify the class sua sponte).

Therefore, for all of the reasons stated above, and under the authority of *42 U.S.C. § 1983, 28 U.S.C. § 2202,* and Fed. R. Civ. P. 65, this Court enjoins Judge Lynda L. Heathscott and Judge Dennis C. Kolenda from violating this Court's Order of March 31, 2000; clarifies that such order pertains to all court rules, regulations or procedures designed to implement the Act declared to be unconstitutional; clarifies that such order prohibits all state court judicial officers from taking any action whatsoever to enforce or implement the Act; and states that this Order shall have binding effect upon other such non-party judicial officers who participate in the practice declared unconstitutional and who receive notice of this Order, including Judge Kolenda.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated: JUN 30 2000

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

Federal:

US Const., Amend. 14, § 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1331:
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1343:
(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 USC § 1983:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- **Michigan:**

Michigan Constitution of 1963:
Mich Const 1963, art 1, § 20, Rights of accused in criminal proceedings:
In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so

orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Michigan Compiled Laws:

MCL 770.3(1) 770.3 Appeal by aggrieved party.
(1) Subject to the limitations imposed by section 12 of this chapter and except as provided in section 16, an aggrieved party shall have a right of appeal from a final judgment or trial order as follows:

(a) Except as otherwise provided in subdivision (d), in a felony or misdemeanor case tried in the circuit court, there shall be a right of appeal to the court of appeals.
(b) Except as otherwise provided in subdivision (d), in a misdemeanor or ordinance violation case tried in a municipal court in a city that adopts a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, or tried in the district court, there shall be a right of appeal to the circuit court in the county in which the misdemeanor or ordinance violation was committed.
(c) In a misdemeanor or ordinance violation case tried in a municipal court in a city that does not adopt a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, there shall be a right of appeal as provided in chapter XIV.
(d) All appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application for leave to appeal.

* * *

(6) Further review of any matter appealed to the court of appeals under this section may be had only upon application for leave to appeal granted by the supreme court.

* * *

MCL 770.3a Defendant pleading guilty, guilty but mentally ill, or nolo contendere; appointment of appellate counsel.

(1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.

(2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:

(a) The prosecuting attorney seeks leave to appeal.

(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the

defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Michigan Court Rules:

MCR 6.005 Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings.

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and

(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:

(1) present employment, earning capacity and living expenses;

(2) outstanding debts and liabilities, secured and unsecured;

(3) whether the defendant has qualified for and is receiving any form of public assistance;

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and

(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

(D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

(G) Unanticipated Conflict of Interest. If, in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the court. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers. The court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require.

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings including sentencing and proceedings

leading to possible revocation of youthful trainee status,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor, and

(4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(I) Plan for Appointment. In each county, the court with trial jurisdiction over felony cases must adopt and publish a plan to govern the process of selecting and appointing lawyers to represent indigent defendants and file it with the supreme court clerk and the state court administrator under MCR 8.112(B)(3).

(J) Assistance of Lawyer at Grand Jury Proceedings.

(1) A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness.

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request appoint one for the witness at public expense.

Rule 6.300 Available Pleas

(A) Possible Pleas. Subject to the rules in this subchapter, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor.

Rule 6.302 Pleas of Guilty and Nolo Contendere.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be tried by the court without a jury, if the defendant chooses and the prosecutor and court consent;

(c) to be presumed innocent until proved guilty;

(d) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(e) to have the witnesses against the defendant appear at the trial;

(f) to question the witnesses against the defendant;

(g) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(h) to remain silent during the trial;

(i) to not have that silence used against the defendant; and

(j) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and

(a) the defendant's sentence exceeds the guidelines,

(b) the plea is a conditional plea under MCR 6.301(C)(2),

(c) the prosecuting attorney seeks leave to appeal, or

(d) the Court of Appeals or the Supreme Court grants leave to appeal.

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the

sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) state why a plea of nolo contendere is appropriate; and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the

defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(F) Plea Under Advisement; Plea Record. The court may take the plea under advisement. A verbatim record must be made of the plea proceeding.

Rule 6.303 Plea of Guilty but Mentally Ill.

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, but not insane, at the time of the offense to which the plea is entered. The reports must be made a part of the record.

Rule 6.304 Plea of Not Guilty by Reason of Insanity.

(A) Advice to Defendant. Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that subrule (C) of this rule, rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

(B) Additional Advice Required. After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center of forensic psychiatry for up to 60 days, and that after the

examination, the probate court may order the defendant to be committed for an indefinite period of time.

(C) Factual Basis. Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that

(1) the defendant committed the acts charged, and

(2) a reasonable doubt exists about the defendant's legal sanity at the time of the offense.

(D) Report of Plea. After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime.

Rule 6.310 Withdrawal or Vacation of Plea Before Acceptance or Sentence.

(A) Withdrawal Before Acceptance. The defendant has a right to withdraw any plea until the court accepts it on the record.

(B) Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

(C) Vacation of Plea Before Sentence. On the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement.

Rule 6.311 Challenging Plea After Sentence.

(A) Motion to Withdraw Plea. The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal. After the time for filing an application for

leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.

(B) Remedy. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(C) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Rule 6.312 Effect of Withdrawal or Vacation of Plea.

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(7), except a judgment or order of the circuit court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(7)(a)(iii)-(v) is limited to the portion of

the order with respect to which there is an appeal of right.

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

(B) Appeal by Leave. The court may grant leave to appeal from:

(1) a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right;

(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court;

(3) a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court;

(4) any other judgment or order appealable to the Court of Appeals by law or rule;

(5) any judgment or order when an appeal of right could have been taken but was not timely filed.

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) 5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) 5 copies of the judgment or order appealed from, of the calendar or docket entries, of the opinion or findings of the lower court, tribunal or agency, and of any opinion or findings reviewed by the lower court, tribunal or agency;

(3) if the appeal is from an administrative tribunal or agency, or from a circuit court on review of an administrative tribunal or agency, evidence that the tribunal or agency has been requested to send its record to the Court of Appeals;

(4) 1 copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court which conducted the hearing;

(b) in an appeal from the circuit court or recorder's court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court or recorder's court;

(c) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(d) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;

(e) in an appeal from an order granting or denying a new trial, such portion of the transcript of the trial as, in relation to the issues raised, permits the court to determine whether the trial court's decision on the motion was for a legally recognized reason and based on arguable support in the record;

(f) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion relating to sentencing;

(g) in an appeal raising any other issue, such portion of the transcript as substantiates the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge.

If the transcript is not yet available, or if there is no record to be transcribed, the appellant shall file a copy of the certificate of the court reporter or recorder or a statement by the appellant's attorney as provided in MCR 7.204(C)(2). The appellant must file the transcript with the Court of Appeals as soon as it is available.

(5) if the appeal is from a probate court order, 5 copies of the probate court's certification of the issue, as required by law;

(6) proof that a copy of the filed documents was served on all other parties; and

(7) the entry fee.

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) 5 copies of an answer to the application (one signed) conforming to MCR 7.212(D), except that transcript page references are not required unless a transcript has been filed; and

(2) proof that a copy was served on the appellant and any other appellee.

(D) Decision.

(1) There is no oral argument. The application is decided on the documents filed and, in an appeal from an administrative tribunal or agency, the certified record.

(2) The court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed. The

clerk shall enter the court's order and mail copies to the parties.

(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.

(4) Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief.

(E) Emergency Appeal.

(1) If the order appealed requires acts or will have consequences within 56 days of the date the application is filed, appellant shall alert the clerk of that fact by prominent notice on the cover sheet or first page of the application, including the date by which action is required.

(2) When an appellant requires a hearing on an application in less than 21 days, the appellant shall file and serve a motion for immediate consideration, concisely stating facts showing why an immediate hearing is required. A notice of hearing of the application and motion or a transcript is not required. An answer may be filed within the time the court directs. If a copy of the application and of the motion for immediate consideration are personally served under MCR 2.107(C)(1) or (2), the application may be submitted to the court immediately on filing. If mail service is used, it may not be submitted until the first Tuesday 7 days after the date of service, unless the party served acknowledges receipt. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the 12 months are counted from the entry of the order denying the motion.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave

to appeal within 21 days after the trial court decides a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing, if the motion was filed within the 12-month period, or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(F)(1) within the 12-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(F)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the docket or calendar entries, or other documentation showing that the application is filed within the time allowed.

(5) [Effective September 1, 2003] The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(G) Certified Concise Statement.

(1) When the Court of Appeals requires a certified concise statement of proceedings and facts, the appellant shall, within 7 days after the order requiring the certified concise statement is certified, serve on all other parties a copy of a proposed concise statement of proceedings and facts, describing the course of

proceedings and the facts pertinent to the issues raised in the application, and notice of hearing with the date, time, and place for settlement of the concise statement.
(2) Hearing on the proposed concise statement must be within 14 days after the proposed concise statement and notice is served on the other parties.
(3) Objections to the proposed concise statement must be filed in writing with the trial court and served on the appellant and any other appellee before the time set for settlement.
(4) The trial court shall promptly settle objections to the proposed concise statement and may correct it or add matters of record necessary to present the issues properly. When a court's discretionary act is being reviewed, the trial court may add to the statement its reasons for the act. Within 7 days after the settlement hearing, the trial court shall certify the proposed or a corrected concise statement of proceedings and facts as fairly presenting the factual basis for the questions to be reviewed as directed by the Court of Appeals. Immediately after certification, the trial court shall send the certified concise statement to the Court of Appeals clerk and serve a copy on each party.

Rule 7.301 Jurisdiction and Term

(A) Jurisdiction. The Supreme Court may:

(1) review a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension (see MCR 9.223-9.226);
(2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);
(3) review by appeal a final order of the Attorney Discipline Board (see MCR 9.122);
(4) give an advisory opinion (see Const 1963, art 3, § 8);

(5) respond to a certified question (see MCR 7.305);
(6) exercise superintending control over a lower court or tribunal (see, e.g., MCR 7.304);
(7) exercise other jurisdiction as provided by the constitution or by law.

REV. 3/01

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE

Use this form if you pled guilty, guilty but mentally ill, or nolo contendere for a crime, and you want to appeal your conviction or sentence. See MCR 7.205 for details on filing an application for leave to appeal.

When to file your application for leave to appeal

- Michigan Court Rule requires that you file the application within 12 months after the circuit court entered your judgment of sentence.

- Your appeal is not "filed" until it has been received by a clerk of the Court of Appeals. That means that if you mail your documents, they are not "filed" when you place them in the mailbox. They are filed when they reach the Court of Appeals and they are stamped by the clerk with the date and time of their arrival.

What to do before preparing and filing your application for leave to appeal

- The Court of Appeals needs copies of certain documents to process the appeal. You will probably need to prepare a letter to the circuit court requesting these documents. If you do not receive one or more of these items before filing your application, make 6 copies of the letter to file with the Court of Appeals to show that you have requested them. These documents are:

1. A copy of the register of actions for your case. If you receive it before you file your application, make 6 copies of it.

2. A copy of the plea and sentencing hearing transcripts. If you receive them before you file your application, make 1 copy of them.
3. If you are raising a sentencing issue, the presentence information report. If you receive it before you file your application, make 1 copy of it.

- Get your prisoner account statement for the past 12 months. Make 1 copy.

- Make 5 copies of your judgment of sentence.

Complete the application for leave to appeal and prepare for filing

A copy of the application with instructions on how to fill it out is provided in the form. Print or type.

- Complete the application for leave to appeal including the cover sheet using the instructions. Sign and date the "original" of the application. Make 5 additional copies.
- Attach one copy of the judgment of sentence and register of actions to each of the applications. If you have not received one or both of these items from the circuit court, attach a copy of the request letter instead.

What happens if you don't file your application for leave to appeal correctly?

If you omit one of the required documents, the clerk's office in the Court of Appeals will send you a letter explaining what is defective about your filing and will give you 21 days to correct it. For example, if you wrote a letter to the circuit court asking for the register of actions, but that court has not sent it before you must file your application, then provide a copy of the letter to the Court of Appeals with your application. You will receive a defect letter from the Court of Appeals giving you 21 days to

send the register of actions. By then, you should have received the
register of actions and can forward it to the Court of Appeals.

Page 1

How to file the application

You must file with the Court of Appeals the following documents to correctly submit an application for leave to appeal from your criminal conviction or sentence:

1. Five copies of an application for leave to appeal (including a statement of delay if applicable), one copy signed.

2. Five copies of the judgment of sentence you are appealing.

3. Five copies of the current circuit court register of actions. If the register of actions is not available when you file your application, substitute it with the request letter to the circuit court.

4. One copy of the transcripts of your plea and sentencing hearings. If the transcripts are not available when you file your application, substitute it with the request letter to the circuit court.

5. One copy of your prisoner account statement and certification, if applicable.

6. A check or money order for $250 to cover the entry fee. If you cannot afford to pay the entry fee, then you must file a motion to waive fees, along with an affidavit of indigency and, if you are incarcerated, a

prisoner account statement and certification for the past 12 months.

- Send one copy of the application and attachments to the prosecutor in the county where you were convicted. Complete the proof of service on the "original" and on your copy showing that you mailed a copy to the prosecutor.

Where to file your application for leave to appeal

- Send the "original" application and 4 copies of the application for leave to appeal and attachments, along with one copy of the transcripts (if available) and one copy of the Prisoner Account Statment (if applicable), to the Clerk of the Court of Appeals at one of the addresses below.

Michigan Court of Appeals
1001 Woodward Avenue
Suite 900
Detroit, MI 48226-1970
(313) 256-9212

Michigan Court of Appeals
American Center Bldg
27777 Franklin Rd, Suite 645
Southfield, MI 48034-8256
(248) 353-6763

Michigan Court of Appeals
Washington Square Bldg
109 W. Michigan Avenue
Lansing, MI 48909-7522
(517) 373-0786

Michigan Court of Appeals
State of Michigan Office Bldg
350 Ottawa Street, NW
Grand Rapids, MI 49503-2349
(616) 456-1167

More Instructions

- Keep one copy of the application and attachments for yourself.

- If there are any items which you ordered from the circuit court but did not receive prior to sending your

application, you must forward the appropriate number of copies of these items to the Court of Appeals when you receive them (5 copies of the register of actions, 5 copies of the judgment of sentence, 1 copy of transcripts, 1 copy of presentence information report). You must also send a copy of these items to the prosecutor, and provide a proof of service to the Court of Appeals that you served the prosecutor with these items. You must date and sign this proof of service.

Page 2.

Approved, SCAO

State of Michigan Court of Appeals	APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE	____Circuit Court _____County

People of the State of Michigan	v	Defendant's name, address, and inmate no.

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:

__ I did not know until recently that I could appeal the decision.

__ I could not afford the postage and copying costs to file this application.

__ I did not know until recently how to appeal the decision.

__ I needed to get help to complete this application.

__ Other:_____
Explain

APPLICATION

2. I was found guilty of the crime(s) as stated below:

Count	Plea G	Plea NC	Crime	Charge Code(s) MCL citation/PACC Code

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge

_____

Name of Judge

[Form on following page.]

Count	Sentence Date	Minimum Yrs	Minimum Mos	Minimum Days	Maximum Years	Maximum Mos	Jail Credit Mos	Jail Credit Days	Date Sentence Begins	Other Info

4. __ I filed with the trial court a request for appointment of an attorney and affidavit of indigency on _____.
Date

Continued on Page 2

MCR 7.205, MCR 7.212, MCL 770.3a(4)

CC 405 (3/01)

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEAA OF GUILTY OR NOLO CONTENDERE

APPLICATION continued

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

_____
_____
_____

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

_____
_____
_____

continued on page 3

CC 405 (3/01) **APPLICATION FOR LEAVE TO APPEAL, Page 2**

7. ARGUMENTS

For each issue listed in item 5. on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

_____

_____

_____

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

_____

_____

_____ _____

Date Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of

_____County by ___ personal service. _____ mail.

_____ _____

Date Signature

CC 405 (3/01) **APPLICATION FOR LEAVE TO APPEAL, PAGE 3**

Supreme Court, U.S.
FILED
NOV 2 6 2003
OFFICE OF THE CLERK

No. 03-407

In the Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A. CRANE,
and JUDGE LYNDA L. HEATHSCOTT,
Petitioners,

JUDGE DENNIS C. KOLENDA,
Respondent,

v.

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DOES THE FOURTEENTH AMENDMENT GUARANTEE AN INDIGENT CRIMINAL DEFENDANT THE ASSISTANCE OF APPELLATE COUNSEL FOR A FIRST-TIER APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN COURT OF APPEALS FROM A PLEA-BASED FELONY CONVICTION, WHERE THE MICHIGAN COURT OF APPEALS GRANTS OR DENIES APPLICATIONS FOR LEAVE TO APPEAL ON THE MERITS?

II. DO RESPONDENT ATTORNEYS HAVE STANDING UNDER THE DOCTRINE OF *JUS TERTII*?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 3

I. The Sixth Circuit and the district court properly concluded that the denial of appointed counsel to indigent defendants filing their first direct appeals after pleading guilty or nolo contendere violates the Fourteenth Amendment 3

A. Contrary to Petitioners' claims, an application for leave to appeal to the Michigan Court of Appeals is not a "discretionary appeal." . . . 6

B. *Douglas* fully applies to appeals following guilty and *nolo contendere* pleas 8

C. The narrow exceptions contained in the statute do not render it constitutional 12

II. The Sixth Circuit and the district court properly concluded that the attorney plaintiffs have standing under the doctrine of *jus tertii* 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page**

Apprendi v. New Jersey, 530 U.S. 466 (2000) 9

Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987) 4, 8

Cabaniss v. Cunningham, 143 S.E.2d 911 (Va. 1965) . . 4

Caplin & Drysdale Chartered v. United States, 491 U.S. 617 (1989) 17

Carey v. Population Services, International, 431 U.S. 678 (1977) 17

Coleman v. Thompson, 501 U.S. 722 (1991) 5

Craig v. Boren, 429 U.S. 190 (1974) 17

Douglas v. California, 372 U.S. 353 (1963) 3-8, 10-13

Evitts v. Lucey, 469 U.S. 387 (1985) 5-11, 18

Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000) 7, 8

King v. Trippett, 192 F.3d 517 (6th Cir. 1999) 8

Martinez v. Court of Appeal of California, 528 U.S. 152 (2000) 10

Mata v. Egeler, 383 F.Supp. 1091 (E.D. Mich. 1974) . 4

Miller-Bey v. Stine,
159 F.Supp.2d 657 (E.D. Mich. 2001) 8

Murray v. Giarratano, 492 U.S. 1 (1989) 5

Myers v. Straub,
159 F. Supp.2d 621 (E.D. Mich. 2001) 7

Onifer v. Tyskiewicz, 255 F.3d 313 (6th Cir. 2001) 8

People v. Bulger,
614 N.W.2d 103 (Mich. 2000) 1, 3, 4, 5

People v. Douglas,
332 N.W.2d 521 (Mich. Ct. App. 1983) 7

People v. Hayden,
348 N.W.2d 672 (Mich. Ct. App. 1984) 7

People v. Plaza, 617 N.W.2d 687 (Mich. 2000) 11

People v. Wiley,
315 N.W.2d 540 (Mich. Ct. App. 1981) 7

Perez v. State,
4 S.W.2d 305 (Tex. Ct. App. 1999) 4

Powers v. Ohio, 499 U.S. 400 (1991) 15, 16, 18

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 9

Ross v. Moffitt, 417 U.S. 600 (1974) 4-6, 8, 11

Secretary of State of Maryland v. Joseph H. Munson Co,
467 U.S. 947 (1984) 19

Singleton v. Wulff, 428 U.S. 106 (1976) 15

Smith v. Robbins, 528 U.S. 259 (2000) 5

State v. Trowell, 739 So.2d 77 (Fla. 1999) 4

Tesmer v. Granholm,
114 F. Supp.2d 603 (E.D. Mich. 2000) 2

Tesmer v. Granholm, 295 F.3d 536 (6th Cir. 2002) 2

Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003) 2

United States Department of Labor v. Triplett,
494 U.S. 715 (1990) 17-19

United States v. MacCollom, 426 U.S. 317 (1976) 5

Statutes

Mich. Comp. Laws § 770.3a (2000) 1, 14-16, 18
Mich. Comp. Laws § 777.1, *et seq.* 9
Mich. Comp. Laws §780.712 14
Mich. Comp. Laws §780.712(b) 14

COUNTERSTATEMENT OF THE CASE

Since 1994, the Michigan Constitution has required a criminal defendant who wishes to appeal his or her conviction and sentence after a plea of guilty or nolo contendere to file an application for leave to appeal to the Michigan Court of Appeals. Mich. Const. 1963, Art. 1, § 20. The Michigan Court of Appeals' decision to grant or deny a properly-filed application depends solely on whether the issues presented are meritorious, and the court's orders "denying leave uniformly state that leave is denied 'for lack of merit in the grounds presented.'" *People v. Bulger,* 614 N.W.2d 103, 124 (Mich. 2000) (Cavanagh, J., dissenting); *see also* (R.2: Motion for Preliminary Injunction, Exhibit B) (examples of Michigan Court of Appeals form orders denying leave to appeal to indigents "for lack of merit in the grounds presented").

After the 1994 amendment to the Michigan constitution that required criminal defendants to file applications for leave to appeal to the Michigan Court of Appeals from plea-based convictions, the vast majority of Michigan judges continued to appoint appellate counsel to assist indigents who wished to pursue appellate relief from their plea-based convictions and sentences. In 1999, however, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan judges "shall not" appoint appellate counsel to assist indigent defendants who wish to file an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction or sentence unless the indigent received an upward departure from the sentencing guidelines or was permitted to enter a conditional plea. A trial judge "may" appoint appellate counsel for an indigent defendant if he or she has preserved an outcome-determinative challenge to the judge's scoring of the sentencing guidelines, but the judge is under no obligation to do so. For all other

types of issues an indigent may raise on appeal, such as the voluntariness of the plea, the adequacy of the factual basis, whether consecutive or concurrent sentencing should have been imposed, or whether the conviction violates double jeopardy, the statute flatly prohibits the appointment of appellate counsel to assist an indigent who wishes to file an application for leave to appeal, no matter how meritorious those issues may be.

The statute has never taken effect because of the instant litigation. The plaintiffs, including several indigent criminal defendants who were denied appellate counsel by defendant state court judges even before the statute took effect and several appellate attorneys who would receive far fewer appointments to represent indigent criminal defendants on appeal if the statute were to take effect, argued that the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment by denying indigents, and only indigents, the assistance of counsel necessary to obtain meaningful appellate review of their convictions and sentences. The district court agreed and therefore declared that the statute violates the Fourteenth Amendment. *Tesmer v. Granholm*, 114 F. Supp.2d 603 (E.D. Mich. 2000) (87a-124a).

Petitioners appealed that decision to the United States Court of Appeals for the Sixth Circuit, arguing both that there is no constitutional right to counsel for the state appeal at issue and that the attorney-plaintiffs lack standing to assert the constitutional rights of their future clients. A panel of the Sixth Circuit agreed with the district court that the attorney-plaintiffs have *jus tertii* standing but reversed the district court's conclusion that the statute is unconstitutional. *Tesmer v. Granholm*, 295 F.3d 536 (6th Cir. 2002) (63a-84a). On rehearing *en banc*, the Sixth Circuit agreed with the district

court and the original panel that the attorney-plaintiffs have *jus tertii* standing. *Tesmer v. Granholm*, 333 F.3d 683, 691-696 (6th Cir. 2003) (*en banc*) (10a-19a). The *en banc* court then affirmed the district court's conclusion that the statute is unconstitutional. *Id.*, 333 F.3d at 696-701 (19a-29a).

ARGUMENT

I. The Sixth Circuit and the district court properly concluded that the denial of appointed counsel to indigent defendants filing their first direct appeals after pleading guilty or nolo contendere violates the Fourteenth Amendment.

There is no compelling reason for this Court to exercise its jurisdiction in this case. The only authority contrary to the conclusion reached by the Sixth Circuit is the Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000), upholding Michigan's attempt to deny counsel to indigents seeking direct appellate review of their plea-based felony convictions. Since the Sixth Circuit squarely held in this case that Michigan cannot constitutionally deny appellate counsel to such indigents, every indigent in the United States, including those in Michigan, currently enjoys the right to appellate counsel on his or her first appeal from a felony conviction. As a result of the Sixth Circuit's decision, the law in this area is once again uniform throughout the United States.

From the time *Douglas v. California*, 372 U.S. 353 (1963), was decided until the passage of the Michigan statute at issue in this litigation, no American jurisdiction had even attempted to deny the appointment of appellate counsel to indigents filing their first direct appeals from felony convictions and sentences because such an attempt would

obviously violate *Douglas* and its progeny. Every case from every jurisdiction to consider the issue had concluded that *Douglas* guarantees an indigent defendant the assistance of appellate counsel for a first appeal, whether that first appeal is denominated as an "automatic" appeal or an appeal "by leave." *See, e.g., Bundy v. Wilson*, 815 F.2d 125, 130 (1st Cir. 1987) (concluding that *Douglas* governs first-tier appeal by leave to the New Hampshire Supreme Court); *Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965) (*Douglas* guarantees right to counsel for first-tier appeal by leave to Virginia Court of Appeals); *Mata v. Egeler*, 383 F.Supp. 1091, 1092-1094 (E.D. Mich. 1974) (*Douglas* guarantees appointment of counsel for indigent pursuing first-tier delayed appeal by leave of court). Until *Bulger*, no court had ever held that the protections of *Douglas* were inapplicable to indigents who pleaded guilty or nolo contendere. *Cf. State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999); *Perez v. State*, 4 S.W.2d 305, 307 (Tex. Ct. App. 1999).

According to Petitioners, however, Michigan may constitutionally deny the appointment of appellate counsel to indigents filing applications for leave to appeal to the Michigan Court of Appeals because such an appeal is a "discretionary" appeal within the meaning of *Ross v. Moffitt*, 417 U.S. 600 (1974). Petitioners' argument seriously misreads *Ross,* which held only that the Fourteenth Amendment does not require the appointment of appellate counsel for a purely discretionary appeal to a state supreme court *after* the indigent had already been provided counsel for an initial appeal to an intermediate appellate court. *Id.* at 614-616. The Court stressed in *Ross* that both the fact that counsel had been provided for an initial appeal and the fact that the second-tier appeal was discretionary were vital to the result. The rationale of *Ross*, that the defendant who has already had appellate counsel through one appeal does not

need counsel to help him file a petition for second-tier discretionary review, completely collapses when applied to a *first-tier* appeal regardless of whether the state calls that first appeal "automatic" or "by leave."

The Michigan Supreme Court's decision in *Bulger,* like the Petitioners' argument in this Court, completely ignores the Court's post-*Ross* cases, all of which clearly indicate that *Douglas*, not *Ross*, applies to the underlying issue in this litigation. The Court has repeatedly explained that the holding in *Ross* was limited to discretionary second-tier appeals. *See United States v. MacCollom*, 426 U.S. 317, 324 (1976) (plurality); *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (explaining *Douglas* guaranteed counsel for "initial appeal," while *Ross* declined to extend "to a discretionary appeal . . . from the intermediate appellate court to the Supreme Court of North Carolina"); *Coleman v. Thompson*, 501 U.S. 722, 756 (1991) (*Ross* "declined to extend the right to counsel beyond the first appeal of a criminal conviction"), *see also id.* at 742 (approvingly citing and discussing Virginia Supreme Court's holding that *Douglas* required appointment of counsel for first appeal by leave of court); *Smith v. Robbins*, 528 U.S. 259, 279 & n. 10 (2000) (concluding that *Douglas* and *Ellis v. United States*, 356 U.S. 674 (1958), require that indigent receive appellate counsel "in all cases" to evaluate case for possible appellate arguments).

In particular, Petitioners ignore the Court's crystal-clear explanation of the difference between *Douglas* and *Ross* in *Evitts v. Lucey*, 469 U.S. 387, 402 (1985), in which the Court held that *Ross* could not be applied to any first appeal on the merits because such an appellant "has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion," and "has not

previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process."

It follows immediately from *Douglas*, *Ross*, *Evitts*, and the other post-*Ross* cases that the appeal at issue in this litigation is an appeal within the meaning of *Douglas* and *Evitts* for which counsel must be provided. A Michigan defendant who pleads guilty or nolo contendere has a right to challenge his or her sentence and conviction by filing an application to the Michigan Court of Appeals. That application is a *first appeal* because the defendant does not already have "a brief on the merits of the appeal, or a previous written opinion" and "has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Evitts*, 469 U.S. at 402. As discussed below in Part A of this argument, the Michigan Court of Appeals, unlike the North Carolina Supreme Court at issue in *Ross*, decides the *merits* of an application for leave to appeal. Since an indigent's application for leave to appeal from a plea-based conviction and sentence will be his or her first and only appeal on the merits, "[i]t follows that for purposes of analysis under the Due Process Clause," that this appeal will be "an appeal as of right, thus triggering the right to counsel recognized in [*Douglas*]." *Evitts* at 402.

A. Contrary to Petitioners' claims, an application for leave to appeal to the Michigan Court of Appeals is not a "discretionary appeal."

Despite the clear language in *Evitts* defining a "discretionary appeal" within the meaning of *Ross* as a second-tier appeal that an appellate court is free to reject on grounds other than the merits, Petitioners persist in repeatedly labeling a first-tier application for leave to appeal to the

Michigan Court of Appeals as "discretionary" without ever analyzing that term and without discussing or even citing *Evitts*. *See, e.g.*, Petition for Certiorari at i (using the term "discretionary" three times in Questions Presented to describe the appeal at issue in this litigation)

As Petitioners acknowledged below, the Michigan Court of Appeals standard order denying a properly-filed application for leave to appeal states that "The Court orders that the application for leave to appeal is DENIED *for lack of merit in the grounds presented*." Defendants' Brief in Response to Petition for Rehearing at 9 (emphasis added); *see also* (R. 2: Motion for Preliminary Injunction, Exhibit B). The Michigan Court of Appeals has itself held many times that an order denying leave to appeal for "lack of merit" in the grounds presented *is* a conclusive determination of the merits of the case, thus precluding further review under the law of the case doctrine. In *People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984), for example, the Michigan Court of Appeals explained, "In an order dated February 1, 1983, another panel of this Court denied defendant's motion to remand on this same issue 'for lack of merit in the grounds presented.' Therefore, we are precluded from reaching the merits of this issue by the law of the case doctrine." *See also People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983) (same); *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981) (same).

Similarly, the federal courts treat a Michigan Court of Appeals order denying leave to appeal "for lack of merits in the grounds presented" as a decision on the merits for purposes of habeas corpus review. *See, e.g., Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (summary order upholding conviction treated as decision on the merits for habeas review); *Myers v. Straub*, 159 F. Supp.2d 621, 626

(E.D. Mich. 2001) (applying *Harris* to form order denying Michigan plea defendant's application for "lack of merit in the grounds presented"); *Miller-Bey v. Stine*, 159 F.Supp.2d 657, 663, 667, 671 (E.D. Mich. 2001) (same); *Onifer v. Tyskiewicz*, 255 F.3d 313, 315-316 (6th Cir. 2001) (applying *Harris* where the Michigan Court of Appeals summarily denied criminal defendant's appeal for "lack of merit"); *King v. Trippett*, 192 F.3d 517, 521 (6th Cir. 1999) (observing that the district court held that the Michigan Court of Appeals' decision denying petitioner's application for "lack of merit" was reasonable application of federal law).

Even if a first direct application for leave to appeal to the Michigan Court of Appeals were truly "discretionary," *Douglas*, not *Ross*, would still apply because such an appeal is a first appeal. *See Bundy*, 815 F.2d at 830 (rejecting claim that *Ross* governs a first-tier discretionary appeal to the New Hampshire Supreme Court because provision of counsel on a first-tier appeal was "vital" to the result in *Ross*); *Evitts*, 469 U.S. at 402 (stressing that *Ross* applies where appellant has previously had assistance of appellate counsel on first appeal). It is clear, however, that a first application to the Michigan Court of Appeals is not a "discretionary" appeal in any sense of the word since it is both a first appeal and an appeal that the Michigan Court of Appeals actually decides on the merits.

B. *Douglas* fully applies to appeals following guilty and nolo contendere pleas.

Petitioners maintain that *Douglas* should not be read to apply to appeals after guilty or nolo contendere pleas because such pleas limit the number of potential appellate issues. The most obvious objections to this argument are that it finds absolutely no support in *Douglas* or in any of the Court's other cases and that it is affirmatively contradicted by the

Court's treatment of this issue in the context of guilty-plea cases.

The Court has consistently recognized that a typical indigent is completely incapable of identifying and raising any kind of issue in a first direct appeal without the assistance of counsel. As the Court put it in *Evitts*, "To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." 469 U.S. at 636. In *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, "It is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."

While a guilty or nolo plea unquestionably does limit the number of potential appellate issues, many potential appellate issues of all levels of complexity remain. Michigan defendants have the right to challenge, after pleading guilty or nolo contendere, dozens of different types of sentencing errors, including Double Jeopardy Clause violations, improper imposition of consecutive sentences, excessive restitution orders, erroneous denials of credit for prior incarceration, breaches of plea bargains at sentencing, denials of allocution, and violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In 1999, the Michigan Legislature enacted a sentencing guideline scheme that rivals its federal counterpart in complexity. *See* Mich. Comp. Laws § 777.1, *et seq.* Yet the

statute at issue in this litigation provides that a trial judge "may," but does not have to, appoint appellate counsel for an indigent who has preserved an outcome-determinative challenge to the judge's own scoring of the sentencing guidelines. In other words, the statute would require many or most indigents to litigate complex sentencing guidelines questions, many of which would be questions of first impression in Michigan, without the assistance of appellate counsel.

As the Court has recognized, *see Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his or her meritorious appellate issues. Nor will he or she be capable of navigating the minefield of appellate procedure in order to file a coherent application for leave to appeal raising the issue. *See Evitts*, 469 U.S. at 636; *see also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (recognizing that even if counsel is ineffective, "it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself").

Petitioners' argument that an indigent should be able to make do with trial counsel's work product is both disingenuous and directly contrary to *Douglas* and *Evitts*. In almost all cases, *there is no written work product of trial counsel for the indigent to use*. The overwhelming majority of plea appeals in Michigan, as in other jurisdictions, involve issues that arise at the sentencing hearing. There is absolutely no requirement in Michigan law that trial counsel's objections to guidelines scoring, jail credit, consecutive sentencing, consideration of prior convictions, restitution orders or any other issue be in writing. Such objections, if trial counsel makes them at all, are almost invariably made orally at the sentencing hearing.

However, even if trial counsel has put something in writing, there is not the slightest suggestion in any of the Court's cases that trial counsel's work product is sufficient to dispense with the appointment of appellate counsel. Indeed, *Douglas* would make no sense if Petitioners' argument were correct because the appellants in *Douglas* presumably could have used their trial attorneys' work product. On the contrary, as *Ross* and *Evitts* make clear, appellate counsel need not be provided for a second-tier appeal only because the indigent has already received *appellate* counsel's work product. *Ross* at 614-615; *Evitts* at 402. Finally, as the Court specifically recognized in *Flores-Ortega*, an appeal arising from a guilty plea, appellate counsel is necessary to assist the indigent in identifying any potentially meritorious issues for appeal in the first place. 528 U.S. at 486.

Even in those rare cases where trial counsel has produced a work product that could help an indigent file an application for leave to appeal, an indigent left to his or her own devices has virtually no chance of successfully overcoming the *procedural* hurdles that stand in the way of having that appeal heard. The Court has specifically recognized that those procedural hurdles are "hopelessly forbidding" to any layperson filing a first appeal. *Evitts*, 469 U.S. at 636. The procedural difficulties an indigent faces in perfecting an appeal are precisely the same whether the appeal follows a conviction by trial or by plea. The Michigan Supreme Court has provided a very good example of this point in *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), where the court held that an indigent plea defendant who was forced to file an application for leave to appeal without the assistance of counsel forfeited his right to have his sentencing appeal heard by the Michigan Court of Appeals because he failed in his attempt to obtain his sentencing transcript.

In short, there is no support for Petitioners' argument that *Douglas* should be limited to appeals from trials, and no American jurisdiction had even attempted to impose such a limitation, much less uphold it, before Michigan launched the effort that led to this litigation.

C. The narrow exceptions contained in the statute do not render it constitutional.

Petitioners contend that the statute is constitutional because it does require the appointment of counsel in four circumstances: (1) to defend a prosecutor's appeal; (2) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; (3) if the plea was conditional; or (4) if the sentence exceeded the guidelines range.

The first two exceptions, by definition, do not apply to the indigent defendant who needs the assistance of appellate counsel to file an application for leave to appeal to the Michigan Court of Appeals. The second exception simply means that if the indigent is somehow able to file an application for leave to appeal on his or her own that miraculously identifies and coherently argues a potential meritorious issue, the Michigan Court of Appeals will then provide counsel. In other words, the vast majority of indigents who cannot identify and raise their own issues in a meaningful way will never get to the point where the second exception could apply.

The third exception, for conditional pleas, is also completely useless to the vast majority of indigents who need the assistance of counsel for two reasons. First, *there is no right in Michigan to enter a conditional plea.* Michigan Court Rule 6.301(C) provides that "A defendant may enter the following pleas *only with the consent of the court and the*

prosecutor: (2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity." (Emphasis added). Since a defendant can only enter a conditional plea with the consent of both the judge and the prosecutor, conditional pleas are exceedingly rare in Michigan.

Second, a defendant can enter a conditional plea only to challenge *"pretrial rulings."* Mich. Ct. Rules 6.301(C)(2) (emphasis added). But the vast majority of appeals after guilty and nolo contendere pleas concern *sentencing* issues. In other words, the possibility of a conditional plea is of absolutely no use to a typical indigent plea defendant whose complaint arises not from a pretrial ruling but from the sentence he or she received after the plea has already been entered and accepted.

The statute's final exception is for defendants who receive an upward departure from the sentencing guidelines. While such defendants undoubtedly need the assistance of appellate counsel, the problem is that they are not the only ones who may have meritorious appellate issues. Indeed, as discussed above, indigents who receive sentences that would have been outside the guidelines range if the trial judge had scored the guidelines correctly are not guaranteed the assistance of appellate counsel even when the indigent has preserved his or her challenge to the trial judge's scoring.

For all other types of appellate issues, no matter how meritorious, the statute flatly forbids the judge from appointing appellate counsel. The vast majority of indigent defendants who wish to appeal from their sentences or pleas, therefore, receive only a "meaningless ritual," while moneyed defendants receive "a meaningful appeal." *See Douglas*, 372

U.S. at 358. The narrow exceptions in this statute cannot save it.

II. The Sixth Circuit and the district court properly concluded that the attorney plaintiffs have standing under the doctrine of *jus tertii*.

The second issue which Petitioners raise concerns the standing of two of the plaintiffs, Arthur M. Fitzgerald and Michael D. Vogler, to challenge the constitutionality of Mich. Comp. Laws §770.3a. The district court held that Mr. Fitzgerald and Mr. Vogler could challenge the act under the doctrine of *jus tertii*. (93a-100a). The Sixth Circuit panel decision affirmed the district court's ruling. (73a-77a). In its rehearing *en banc* the Sixth Circuit also reached the conclusion that third party standing was appropriate.

To understand the *jus tertii* claim being made by Mr. Fitzgerald and Mr. Vogler, it is important to understand the process by which appellate counsel are apportioned to represent indigent defendants in Michigan. In 1978, the Michigan Legislature established an Appellate Defendant Commission. Mich. Comp. Laws §780.712. One of the functions of that Commission was to compile and maintain a statewide roster of attorneys eligible and willing to accept assigned criminal appeals. Mich. Comp. Laws §780.712(b). Subsequently, by Administrative Order of the Michigan Supreme Court, the agency known as Michigan Assigned Appellate Counsel System (MAACS) was established to perform this function. Michigan Supreme Court Administrative Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. Administrative Order 1981-7, §2(1), 412 Mich. lxviii. After qualifying for the statewide list, the attorney selects the circuit courts he is

willing to take appeals from by placing his name on a local list. Michigan circuit court judges appointing appellate counsel to an indigent defendant must appoint from this roster of approved lawyers. Moreover, in appointing appellate counsel in a particular case, the local circuit court or its designated representative rotates through the local list. Administrative Order 1989-3(4), (5), 432 Mich. cxxii (1989).

Mr. Fitzgerald is on the roster of qualified attorneys able to take assigned criminal appeals from convictions in Michigan's 10th Circuit Court. (R. 1: Complaint, ¶ 33). Mr. Vogler is on the list of attorneys who will be assigned criminal appeals from Michigan's 26th Circuit Court. (*Id*, ¶ 34). Both earn a portion of their income by taking assigned appeals from trial and plea-based convictions (*Id*, ¶¶ 33, 34). Because of the way that the assigned counsel system operates in Michigan, Mich. Comp. Laws §770.3a will adversely affect the income of both Mr. Fitzgerald and Mr. Vogler because, "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." (*Id*, ¶ 36).

Under the doctrine of *jus tertii*, a plaintiff has standing to assert the constitutional rights of third parties if three requirements are met: (1) "the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute;" (2) "the litigant must have a close relationship to the third party;" and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Singleton v. Wulff*, 428 U.S. 106 (1976).

In the district court and again before the Sixth Circuit, Petitioners challenged only one of the three requirements for

jus tertii standing identified in *Powers*. They contended that Mr. Fitzgerald and Mr. Vogler could not establish *jus tertii* standing because they had not sustained an "injury on fact." Petitioners have substantially modified their position in this Court. They now contend that Mr. Fitzgerald and Mr. Vogler lack standing because they cannot satisfy any one of the three requirements set out in *Powers*. Petitioners are wrong on all three points.

Mr. Fitzgerald and Mr. Vogler have alleged that the reduction of appointed appellate assignments caused by Mich. Comp. Laws §770.3a will reduce the amount of income which they will earn through criminal appellate assignments. This allegation cannot be denied. The description of the Michigan assigned appellate system provided above demonstrates that the operation of this statute will necessarily result in a loss of income for both Mr. Fitzgerald and Mr. Vogler. Indeed, the Petitioners concede that Mr. Fitzgerald and Mr. Vogler will lose income as a result of the statute. They acknowledge in their Petition that, "the Attorneys' claim that the statute will adversely affect their incomes must be taken as true." Petition, p. 23.

Loss of income is the classic "injury in fact" supporting third party standing. In *Singleton, supra,* the Court held that physicians who would perform abortions had standing to assert the constitutional rights of their patients to challenge a statute denying Medicaid reimbursement for certain abortions. As the Court put it: "there is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute. . . . If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions." 428 U.S. at 112-113.

Similarly, in *Craig v. Boren*, 429 U.S. 190 (1974), the Court held that a female beer vendor had *jus tertii* standing to challenge a statute barring males under the age of twenty-one from purchasing beer. The Court ruled that the vendor had standing to assert the constitutional rights of her male customers even though the statute did not violate her own constitutional rights, because she suffered "a direct economic injury through the constriction of her buyers' market." *Id*. at 194. The vendor's loss of income, therefore, provided the basis for third party standing in *Craig*. *Cf. Carey v. Population Services, International*, 431 U.S. 678, 683-684 (1977).

Petitioners also claim that Mr. Fitzgerald and Mr. Vogler do not possess a "close relationship" to the third party whose rights are involved. The third parties whose constitutional rights are involved herein are Mr. Fitzgerald's and Mr. Vogler's prospective indigent clients. This Court has held on at least two prior occasions that the lawyer/client relationship is sufficiently close to support third party standing. *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 623, n. 3 (1989); *United States Department of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990).

The Court's decision in *Triplett* also disposes of another argument which Petitioners offer. They contend that because the clients whose rights Mr. Fitzgerald and Mr. Vogler would assert are their *prospective* clients, no "close relationship" exists. However, in *Triplett*, this Court specifically recognized an attorney's standing to challenge a limitation on the fees which a lawyer could charge where that limitation "deprives the lawyer's *prospective* client of a due process right to obtain legal representation . . ." 494 U.S. at 720 (emphasis added).

The final requirement for *jus tertii* standing is that the third party's ability to assert his own interest must in some way be hindered. As the Sixth Circuit properly noted in its *en banc* decision, this Court's precedents do not require proof that it would be impossible for the third party to protect his own interest. (App. 12a-13a). All that is required is some impediment that affects the "likelihood and ability of the third parties . . . to assert their own interests." *Powers*, 499 U.S. at 414.

In this case, the likelihood and ability of Mr. Fitzgerald's and Mr. Vogler's prospective clients to assert their own rights is directly tied to the right which they would be denied under Mich. Comp. Law §770.3a. If the indigent defendants whom the two Respondents would represent are to vindicate their interests in the Michigan appellate system, they must do so without the benefit of counsel. These indigent defendants would be compelled to navigate on their own the "hopelessly forbidding" procedural rules governing appeals. *Evitts*, 469 U.S. at 636. Moreover, they would be required to develop the complex legal arguments supporting their claim without the assistance of an attorney. Under these circumstances, there exists a clear impediment to the third parties' ability to protect their own interests.

This case fits squarely within the description of third party standing discussed by the Court in *Triplett*. In that case the Court held that an attorney had the right to assert the constitutional interests of a client in the following circumstances:

> When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which

> relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. *See Secretary of State of Maryland v. Joseph H. Munson Co*, 467 U.S. 947, 954, 958, (1984).

494 U.S. at 720. Here, an unconstitutional restriction prevents Mr. Fitzgerald and Mr. Vogler from entering into a relationship with third parties, despite the fact that these third parties have a constitutional entitlement to that attorney-client relationship. Under the Court's decision in *Triplett*, third party standing is appropriate here.

The Sixth Circuit's resolution of the third party standing issue presented in this case is fully consistent with the precedents of this Court. Furthermore, the Petitioners have not suggested that the Sixth Circuit's ruling on this point is inconsistent with a decision rendered by another federal appeals court.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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(2)

No. 03-407
October Term, 2003
IN THE SUPREME COURT
OF THE UNITED STATES

Supreme Court, U.S.
FILED
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JOHN F. KOWALSKI,
Judge of the 26th Circuit Court
of Michigan, et al
Petitioners

v

JOHN C. TESMER, et al
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR WAYNE COUNTY, MICHIGAN AS AMICUS, SUPPORTING PETITIONER

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Statement of The Question

I.

IS A CRIMINAL DEFENDANT CONSTITUTIONALLY ENTITLED TO THE APPOINTMENT OF COUNSEL TO PREPARE A DISCRETIONARY APPLICATION FOR LEAVE TO APPEAL FROM HIS CONVICTION BY WAY OF A PLEA OF GUILTY?

Statement of Facts

Amicus joins in the Statement of Facts of the Petitioner.

TABLE OF CONTENTS

Statement of the Question ..... -i-

Index of Authorities ..... -ii-

Statement of Facts ..... -i-

Reasons the Writ Should Be Granted ..... -1-

I. A defendant is not constitutionally entitled to the appointment of counsel to prepare a discretionary application for leave from his conviction by way of a plea of guilty ..... -1-

Introduction: The 6th Circuit Opinion ..... -1-

I. The Due Process and Equal Protection Clauses ..... -4-

A. Due Process and Appeals ..... -4-
B. Equal Protection and Appeals ..... -6-

II. "Access to The Courts" ..... -10-

A. Griffin. Douglas. and Moffitt ..... -10-
B. "Access to the Courts" and the "Prisoner's Rights" Cases ..... -14-

Conclusion ..... -19-

Relief ..... -20-

TABLE OF AUTHORITIES

FEDERAL CASES

Black v Secretary of Health and Human Services.
93 F.3d 781 (CA Fed. 1996) 9

Bounds v Smith.
430 U.S. 817. 97 S. Ct. 1491. 52 L. Ed. 2d 72
(1977) 15. 16. 17

Gagnon v Scarpelli.
411 U.S. 778. 93 S. Ct. 1756. 36 L. Ed. 2d 656
(1973) 2

Griffin v Illinois.
351 U.S. 12. 76 S. Ct. 585.
100 L. Ed. 891 (1956) 6. 11

Harris v McRae.
448 U.S. 297. 100 S. Ct. 2671. 65 L. Ed. 2d 784
(1980) 10

Ex parte Hull.
312 U.S. 546. 61 S. Ct. 640.
85 L. Ed. 1034 (1941) 14. 15

Johnson v Avery.
393 U.S. 483. 89 S. Ct. 747. 21 L. Ed. 2d 718
(1969) 15. 18

Keevan v Smith.
100 F.3d 644 (CA 8. 1996) 9

Lewis v Casey.
518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) 1, 10, 15, 16, 17

M.L.B. v S.L.J.,
519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) 3, 6

Mays v City of East St. Louis.
123 F.3d 99 (CA 7, 1997) 4

McKane v Durston.
153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894) 5

McLean v Crabtree.
173 F.3d 1176 (CA 9, 1999) 9

National Labor Relations Board v International Brotherhood of Electrical Workers.
481 U.S. 573, 107 S. Ct. 2002, 95 L. Ed. 2d 557 (1986) 3

National Paint v City of Chicago.
45 F.3d 1124 (CA 7, 1995) 4

Pennsylvania v Finley.
481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) 6, 14

Ross v Moffitt.
417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974) 1, 3, 6, 13, 14, 19

San Antonio Independent School District v Rodriquez.
411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) 6, 8, 10

Smith v Boyle.
144 F.3d 1060 (CA 7, 1998) 9

Tesmer v Granholm.
333 F.3d 636 (CA 6, 2003) 1

Tucker v United States Department of Commerce.
958 F.2d 1411 (CA 7, 1992) 9

Village of Arlington Heights v Metropolitan Housing Development.
429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) 8, 9, 10, 11

Wainwright v Torna.
455 U.S. 5 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) 14

Washington v Davis.
426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) 7, 8, 9, 11, 16

Wilson v Blankenship.
163 F.3d 1284 (CA 11, 1998) 17

Wilson v Yaklich.
148 F.3d 596 (CA 6, 1998) 10

Wolff v McDonnell.
418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) 15, 17, 18

OTHER

John Hart Ely. *Democracy and Distrust* (1980) 4

Scalia. *A Matter of Interpretation* (Princeton University Press. 1997) 20

Reasons the Writ Should Be Granted

I.

A defendant is not constitutionally entitled to the appointment of counsel to prepare a discretionary application for leave from his conviction by way of a plea of guilty.

The precise rationale for the Griffin *and* Douglas *lines of cases has never been explicitly stated. some support being derived from the Equal Protection Clause of the Fourteenth Amendment. and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached....*

Ross v *Moffitt*. 417 US 600. 94 S Ct 2437. 41 L Ed 2d 341 (1974)

Introduction: The 6th Circuit Opinion

In its opinion. *Tesmer v Granholm*. 333 F3d 636 (CA 6. 2003). the Sixth Circuit. overturning the panel decision. and disagreeing with the Michigan Supreme Court. affirmed a district court order enjoining certain Michigan judges from failing to appoint counsel for defendants convicted by way of plea of guilty who wish to avail themselves of Michigan's appeal procedure for those who are convicted by plea–an application for leave. seeking discretionary review in the Michigan Court of Appeals. Some judges are enjoined. while the rest of the judges in the State are not. whether a Michigan statute that prohibits appointment of counsel for defendants who have been convicted by plea for preparation of an application for leave other than in specified circumstances has been called into question. and a Michigan Supreme Court decision (from which this Court denied certiorari) is cast into

doubt. Principles of neither due process nor equal protection support the decision of the Sixth Circuit. Plenary review by this Court is thus required.

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue. for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context.

> Applied to an erroneous point of departure. the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the (provision). Some distance down that path. however. there comes a point at which a later incremental step. again rational in itself. leads to a result so far removed from the (text) that obedience to text must overcome fidelity to logic. Chief Justice Burger's remarks...are nowhere more applicable than in this context: "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third. fourth. or fifth 'logical' extension occurs. Each step. when taken. appeared a reasonable step in relation to that which preceded it. although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial. as in the legislative process: 'thus far but not beyond.'"

National Labor Relations Board v *International Brotherhood of Electrical Workers*. 481 US 573. 107 S Ct 2002. 95 L Ed 2d 557 (1986)(Scalia. concurring). Amicus thus begins with the relevant text.

The 14th Amendment provides. in relevant part:

> No State shall...deprive any person of life. liberty. or property. without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

The search for a possible constitutional basis for a right to counsel on a first appeal when that appeal is discretionary with the appellate court is difficult. and the cases from this Court are often less than clear. complicating the matter. for to this day "(t)he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated." *Ross* v *Moffitt*. supra. Amicus will look to Due Process and Equal Protection principles.[1] beginning the hunt with the Due Process Clause.

I. The Due Process and Equal Protection Clauses

A. Due Process and Appeals

Thankfully. it is not necessary in this case to step into the quagmire that is the paradox of "substantive due process."[2] On any plausible reading of the text the Due

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2. Justice Thomas has said in a closely related context: "I therefore analyze petitioner's claim under both the Due Process and Equal Protection Clauses. If neither Clause affords petitioner the right...(claimed). I assume that no amalgam of the two does." *M.L.B.* v *S.L.J.*. 519 US 102. 117 S Ct 555. 136 L Ed 2d 473 (1996) (Thomas. J, dissenting. 117 S Ct at 570).

3. "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' ... Familiarity breeds inattention. and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.' " John Hart Ely. *Democracy and Distrust*. p. 18 (1980). See also *National Paint* v *City of Chicago*. 45 F3d 1124. 1128 (CA 7. 1995) ("Plaintiffs...assert...that the ordinance is a violation of

Process Clause sets *no* "right" of persons beyond the reach of government. instead specifically providing that an individual *can* in fact be deprived by the State of his or her property (in whatever aspect). his or her liberty (in whatever aspect). and even his or her very *life*. the Clause containing the limitation that any such deprivation *must* occur in accordance with "due process of law," which protection plainly is. then. a procedural guarantee. How a constitutional provision which expressly authorizes the taking of life. liberty. or property. so long as in accordance with due process of law. has come to be viewed as mandating recognition of certain interests which are "undeprivable" no matter the sort of process provided. remains something of a mystery.

Here. though. oxymoronic "substantive" process plays no part. for this case concerns the Due Process Clause in its obvious procedural form. at issue being the quintessential "liberty" interest of individuals. deprivation of which by the State is contingent upon due process of law–a criminal conviction results in the loss of liberty either by confinement or through restrictions associated with probation. and perhaps some loss of property through fine. This deprivation of liberty must. as commanded by the 14th Amendment. occur in accordance with "due process" of law. The bulk of the process which is "due" a criminally accused appears in specific portions of the Bill of Rights. applied to the States through the doctrine of selective incorporation. Thus. the accused is protected by. among others. principles of double jeopardy. the right against self-incrimination. the right to a speedy trial. the right to a public trial. the right to fair notice (to be informed of the nature and cause of the accusation). the right to confrontation. the right to compulsory process. and

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substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it"): *Mays* v *City of East St. Louis*. 123 F3d 99. 1001 (CA 7. 1997)("...'substantive due process' is an oxymoron").

the right to the effective assistance of counsel. Other requirements essential to fair procedure have been identified. which generally are subsidiary to these rights. such as the right to an impartial judge. the right to an impartial jury. the right not to be compelled to trial garbed in identifiable jail clothing (thereby compromising the right to an impartial fact-finder). and so on. But what of the right to appellate review? Is there a right under the Due Process Clause to appellate review of a criminal conviction as a necessary requisite to the deprivation of liberty permitted by that Clause so long as in accordance with due process?

The answer. of course. is "no." as has been established for over a century. The lead case is *McKane* v *Durston*. 153 US 684. 14 S Ct 913. 38 L Ed 867 (1894). There the accused was convicted at trial with election fraud and sentenced to Sing Sing prison for six years. He was neither entitled to bail nor admitted to discretionary bail. and claimed a constitutional right to bail pending appeal: in essence. he claimed that he was due the "process" of an appeal *before* his liberty could constitutionally be restrained. Writing for a unanimous Court. the first Justice Harlan observed that

> A review by an appellate court of the final judgment in a criminal case. however grave the offense of which the accused is convicted. was not at common law. and is not now. a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. It is therefore clear that the right of appeal may be accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper."* 153 US at 687. 14 S Ct at 915 (emphasis supplied).

The point has been reiterated time and again. See *Griffin* v *Illinois*. 351 US 12. 76 S Ct 585. 590. 100 L Ed 891 (1956)("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate

review at all"): *Ross* v *Moffitt*. supra. 94 S Ct at 2442 ("...a State is not obliged to provide any appeal at all for criminal defendants"): *Pennsylvania* v *Finley*. 481 US 551. 107 S Ct 1990. 1993. 95 L Ed 2d 539 (1987)("...it is clear that the State need not provide any appeal at all"): *M.L.B.* v *S.L.J.*. supra. 117 S Ct at 560 ("...the Federal Constitution guarantees no right to appellate review...."). After all. no appeals from convictions in the federal courts were permitted until late in the 19th century. See *Griffin* v *Illinois*. supra. 76 S Ct at 591 (Justice Frankfurter. concurring).

It ineluctably follows from the fact that the process which is "due" before liberty may be taken by way of a criminal prosecution does not include the right to appellate review that when appellate review *is* provided it may. at least under the Due Process Clause. be "accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper.*" as the formidable first Justice Harlan wrote for the Court over a century ago. The Due Process Clause simply has nothing to say about whether provision of a discretionary first appeal rather than a first appeal of right requires the appointment of counsel. for that Clause does not require the existence of the process of an appeal of any sort in the first instance. This leaves the Equal Protection Clause as the only possible source of a constitutional command that counsel be appointed on a discretionary first appeal. for though the Due Process Clause does not require the process of an appeal. if the State decides. by law. to provide for an appeal. then it must not deny to any person the "equal protection" of that law.

B. Equal Protection and Appeals

The respondent. however. can find no succor in the Equal Protection Clause. That Clause "confers no substantive rights and creates no substantive liberties." *San Antonio Independent School District* v *Rodriquez*. 411 US 1. 93 S Ct 1278. 1309. 36 L Ed 2d 16 (1973)(Stewart. J.. concurring). The equal protection claim is that those who have sufficient

funds can hire counsel to represent them to prepare and file an application for leave to appeal. while those without sufficient funds are without counsel unless the State assists them by providing counsel at State expense. Does the Equal Protection Clause require that the State provide this affirmative assistance. or is this a matter for the political branches of government to decide?

As an initial matter. amicus has trouble understanding how a constitutional provision establishing a neutral method of seeking review of a conviction entered by way of a plea of guilty is nonetheless discriminatory against the poor and denies "any person...equal protection of the laws" simply because some people will be unable to pay for counsel to assist them in seeking review. Cf. *Washington* v *Davis*. 426 US 229. 96 S Ct 2040. 2050. 48 L Ed 2d 597 (1976),[4] for it cannot be gainsaid that the portion of Article 1. § 20 in question is neutral on its face. Though reasonable people can perhaps disagree regarding the wisdom of the 1994 amendment. there is no question that its purpose was non-discriminatory. The genesis of the amendment was a backlog in the Michigan Court of Appeals causing at least a two year delay from the filing of an appeal to decision. See Robert Webster. "Introduction to the Report of the Task Force on Appellate Courts." 7 Mich B J 895 (1993). Pursuant to the call of the President of the State Bar of Michigan. the State Bar Board of Commissioners created a special Task Force to study the backlog problem. and that Task Force recommended a constitutional change in guilty plea appeals. so that where the defendant was made aware of the sentence to be imposed prior to the plea. and that sentence was imposed. appeal

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4. "As an initial matter. we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 96 S Ct at 2050.

would be by leave: the Task Force also expressed its view that the right to a transcript and to counsel should remain. See 7 Mich B J at 898. and also Mr. Ward's dissent at 903-904. These recommendations ultimately became the amendment to Article 1. § 20. which eliminates the appeal of right in guilty plea and nolo contendere convictions. and says nothing about counsel.

Again. however one may wish to debate the merits of the Amendment. it is the law of Michigan. and it cannot be argued that there was any purpose on the part of the Legislature or the People of the State to discriminate against the poor. An equal protection claim thus must rest on an argument that the Amendment has a "disparate impact" on the indigent. who will be less able to avail themselves of the application for leave process successfully than those who can afford to retain counsel. But under well-settled equal protection doctrine. disparate impact. even if proven. is insufficient to raise a constitutional claim as against a facially neutral statute (or constitutional provision). *San Antonio Independent School District*. supra. rejecting a claim that Texas school financing denied equal protection of the law to the poor. makes the point. observing that "at least where wealth is involved. the Equal Protection Clause does not require absolute equality or precisely equal advantages." 93 S Ct at 1292.

That a "disparate impact" is insufficient to support an equal protection claim was made absolutely clear by the United States Supreme Court in *Washington* v *Davis*. supra. The claim brought was that a portion of an employment test for police officer in the District of Columbia. neutral on its face. denied equal protection to black applicants because a higher percentage of black applicants failed that portion of the test than did Caucasian applicants. The Court disagreed. observing that "our cases have not embraced the proposition that a law or other official act. without regard to whether it reflects a racially discriminatory purpose. is unconstitutional solely because it has a racially disproportionate impact." 96 S Ct at 2046. A discriminatory *purpose* is a necessary part of

an equal protection claim. for a "rule that a statute designed to serve neutral ends is nevertheless invalid. absent compelling justification. if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about. and perhaps invalidate, a whole range of tax. welfare. public service. regulatory. and licensing statutes that may be more *burdensome to the poor* and to the average black than to the more affluent white." 96 S Ct at 2050 (emphasis supplied).

Davis was followed in *Village of Arlington Heights* v *Metropolitan Housing Development*. 429 US 252. 97 S Ct 555. 50 L Ed 2d 450 (1977). An equal protection challenge to zoning requirements which prevented the building of multi-family low income housing was rejected as absent was any showing of discriminatory purpose. *Davis* made it clear. said the Court. that an official action "will not be held unconstitutional solely because it results in a ...disproportionate impact:" rather. "(p)roof of ...discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Davis* simply reaffirming "a principle well established in a variety of contexts." 97 S Ct at 563. See also *Smith* v *Boyle*. 144 F3d 1060. 1064 (CA 7. 1998)("...to be actionable a denial of equal protection must be intentional....disparate impact–a law's unintentionally bearing harder on one group than another–is not a permissible basis for finding a denial of equal protection"): *McLean* v *Crabtree*. 173 F3d 1176. 1185 (CA 9. 1999) ("...discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"); *Keevan* v *Smith*. 100 F3d 644. 651 (CA 8. 1996) ("Because the policy challenged by the appellants is neutral on its face. the female prisoners must establish that the alleged disparate impact is the result of discriminatory purpose." the court rejecting a claim that a prison industry program discriminated on the ground of sex): *Black* v *Secretary of Health and Human Services*. 93 F3d 781. 788 (CA Fed. 1996) (the court rejecting a claim of equal protection based on indigency. noting that "...the fact that the

statute may have a *disparate impact on indigents* does not call for heightened scrutiny under equal protection principles"): *Tucker* v *United States Department of Commerce*. 958 F2d 1411. 1413-1414 (CA 7. 1992) (rejecting a "census undercount" claim. remarking that the "..only discrimination forbidden by (the Equal Protection Clause) is intentional discrimination. Disparate impact. which means the unintended consequences of measures adopted for reasons unrelated to any intention to discriminate. is not. under the Supreme Court's current interpretation of the Constitution. an acceptable basis for a finding of unconstitutional discrimination....").

Moreover. even if it could be shown that the legislature and/or the People of the State had intentionally created a classification based on ability to pay. "neither indigents nor prisoners are a suspect class." so that "such differentiation is permissible as long as even a rational basis for the differing treatment can be shown." *Wilson* v *Yaklich*. 148 F3d 596 (CA 6. 1998): see also San Antonio Independent School District. supra: *Harris* v *McRae*. 448 US 297. 100 S Ct 2671. 65 L Ed 2d 784 (1980). While reasonable people could disagree as to whether the Amendment to Article 1. § 20 is sound policy. no reasonable person could support a contention that it is unsupported by a "rational basis." It is certainly rational to treat guilty plea cases and convictions arising from trials differently in terms of appeal.

Under current Equal Protection Clause principles. then. there can be no successful claim that the Clause requires the appointment of counsel for a discretionary first appeal because there can be shown no intent to discriminate. and a failure to "carry (the) burden of proving that discriminatory purpose was a motivating factor....ends the constitutional inquiry....(proof of) a discriminatory 'ultimate effect' is without independent constitutional significance." *Arlington Heights*. supra. 97 S Ct at 566. Moreover. even if a "discriminatory purpose" could be shown. the classification is supported by a rational basis.

II. "Access to The Courts"

A. Griffin, Douglas, and Moffitt

Analysis should begin with *Griffin*. That case involved a state appeal of right from a criminal conviction. the question being whether the State of Illinois could "administer this statute so as to deny adequate appellate review to the poor while granting such review to all others" by requiring that all appellants. without regard to ability to pay. file a bill of exceptions. which could not be prepared without a transcript of the trial proceedings. The plurality addressed the question under the "Due Process and Equal Protection Clauses of the Fourteenth Amendment." 76 S Ct at 588-89. without differentiating the two. but the opinion of Justice Black clearly sounds in equal protection. That opinion agreed that a State is "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." but held that when a State does grant appellate review it cannot do so in a way "that discriminates against some convicted defendants on account of their poverty." the convicted defendants being protected "from invidious discriminations." 76 S Ct 15 590. Concluding that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." the Court held that either a transcript must be provided or some "other means of affording adequate and effective appellate review to indigent defendants." 76 S Ct at 591. Justice Frankfurter concurred. supplying the fifth vote. on equal protection grounds. Though. he said. "a State need not equalize economic conditions." where it has provided a right to appellate review of convictions it cannot set up a system which in effect *completely forecloses* the indigent from its use. 76 S Ct at 592-593.

Justice Burton. for himself and Justices Minton. Reed. and Harlan. dissented. The Illinois system could not. Justice Burton said. deny due process. given that the process of an appeal is not required by the constitution at all as a necessary

prerequisite to the taking of liberty pursuant to a criminal conviction. An equal protection question could be raised. but the claim would be unavailing. for the State is not required to equalize economic conditions before its bar of justice. and the law was neutral ("open to all") on its face. a discussion presaging *Davis* and *Arlington Heights*. Justice Harlan in a separate dissent also found no due process or equal protection violations. for the statute was in fact neutral. and what the majority had decided was not that the State of Illinois had discriminated but that it had a duty *to* discriminate. 76 S Ct at 598. Again. the language sounds much like the modern equal protection analysis in *Davis*. *Arlington Heights*. and many other cases. To the extent a rationale can be discerned from the case. it is an equal protection case. employing an analysis that is today clearly discredited.

In much the same vein is *Douglas*. Again the case concerned an appeal granted by state law as of right to a convicted defendant. The petitioners were denied their request for appointment of counsel on the appeal of right. The Court agreed with the dissenting justice in the California Supreme Court that "denial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin*...." 83 S Ct at 815. The majority held that as with *Griffin* "the evil is the same--discrimination against the indigent." which it found could not be permitted "with the first appeal. granted as a matter of right to rich and poor alike... from a criminal conviction." 83 S Ct at 816. Only a fleeting reference was made to any constitutional provision compelling the appointment of counsel–the 14th Amendment–and no mention was made of some separate right of "meaningful access to the appellate process." The ground of decision. from the language employed. was plainly one of equal protection. through an analysis that no longer obtains in equal protection jurisprudence. the statute being neutral on its face. and there being no demonstration of any purposeful discrimination. Justice Harlan dissented once again. rejecting the analysis of

the majority in language that is strikingly similar to contemporary equal protection doctrine:

> The States. of course. are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. or. on the other hand. from making some effort to redress economic imbalances while not eliminating them entirely.....no one would dispute the constitutional power of the State to levy a uniform sales tax. to charge tuition at a state university. to fix rates for the purpose of water from a municipal corporation. to impose a standard fine for criminal violations. or to establish minimum bail for various categories of offenses....Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances."

83 S Ct at 361-362. This opinion. as can readily be seen. reads precisely like modern equal protection cases.

The Court in *Ross v Moffitt*. supra. declined to extend *Douglas* beyond the "first appeal of right" to require counsel "for discretionary state appeals and for applications for review in this Court." 94 S Ct at 2438. The Court held that *Griffin* and related decisions concerned "state-imposed financial barriers" which effectively "*cut off* appeal rights for indigents while leaving open avenues of appeal for more affluent persons." while *Douglas*. to insure that an indigent's "access to the appellate system was adequate." had required the appointment of counsel for "initial appeals as of right." And even *Douglas*. the Court quoted. had observed that a "state

can. consistently with the Fourteenth Amendment. provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination....Absolute equality is not required: *lines can be and are drawn and we often sustain them*" (emphasis supplied). 94 S Ct at 2443.

The ground of decision in *Griffin* and *Douglas* was difficult to discern. found the Court in *Moffitt*. To the extent that Due Process or Equal Protection were employed in those cases. the Court did not believe that either Clause could be viewed as commanding the appointment of counsel for a discretionary appeal. The Court contrasted the appeal from the trial. as in the appeal "it is ordinarily the defendant. rather than the State. who initiates the appellate process. seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." The question of appointment of counsel under due. process principles. the Court said. makes little sense in the context of an appeal. given that there is no Due Process right to an appeal at all; rather. the "question is more profitably considered under an equal protection analysis." 94 S Ct at 2444. The Court concluded that *Griffin*. *Douglas*. and similar cases stand for the proposition that the indigent defendant cannot be "entirely cut off from any appeal at all" or left with a "meaningless ritual." 94 S Ct at 2444. and that provision of counsel for a discretionary appeal is not required by Equal Protection principles. Once again. under current equal protection principles the issue would be readily resolved: the existence of a neutral statute. and the absence of a discriminatory intent. would be the end of the inquiry.

Griffin. *Douglas*. and *Moffitt*[5] do not establish any right to "meaningful access to the appellate process" as a part of Due Process. which would. given the lack of a right to an

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5. And. of course. *Moffitt* has been followed as *Wainwright* v *Torna*. 455 US 5t86. 102 S Ct 1300. 71 L Ed 2d 475 (1982) and *Pennsylvania* v *Finley*. supra ("...the right to appointed counsel extends to the first appeal of right. and no further").

appellate process at all. be impossible. the most that can be said is that the cases preclude the *foreclosure* of an appeal to an indigent that is available to those with funds. or the provision of a "meaningless ritual" to the indigent. and this on an Equal Protection rationale which has been *repudiated by current Equal Protection doctrine*. Given current Equal Protection doctrine. the cases have no constitutional foundation. This is not to say that this Court must necessarily overrule them. But it is certainly appropriate for the Court not to *extend* them: that is. to say. "this far. and no further." given the lack of a constitutional command allowing the exercise of judicial authority to compel the appointment of counsel for an indigent defendant on a discretionary appeal. be it the "first" appeal or not. There is simply no escaping that the Due Process Clause cannot be violated by the manner in which process is given when that process is not required at all by the Due Process Clause. and that Equal Protection cannot be violated absent discriminatory purpose with a neutral law. which is lacking in this case.

B. "Access to the Courts" and the "Prisoner's Rights" Cases

The case generally recognized as the progenitor of the "access to the courts" constitutional doctrine is *Ex parte Hull*. 312 US 546. 61 S Ct 640. 85 L Ed 1034 (1941). *Hull* concerned a prison regulation requiring that petitions for habeas corpus be submitted by inmates to a prison administrator for a determination that they were "properly drawn" before filing with the federal court. If the administrator did not approve the petition. it could not be filed. The United States Supreme Court simply held that whether a petition for a writ of habeas corpus addressed to a federal court is "properly drawn" is not a matter for determination by the executive branch of government through its bureaucracy. but for the "court alone to determine." 61 S Ct at 642. No affirmative obligations by way of assistance to the prisoner were required in Hull: rather. the Court held that

the executive branch has no business blocking ("abridging or impairing") the filing by prisoners of petitions with a court.

The second lead case, *Johnson* v *Avery*, 393 US 483, 89 S Ct 747, 21 L Ed 2d 718 (1969), also imposed no obligation of assistance on the State, instead precluding a different form of State "abridgement or impairment" of inmates filing of legal papers in a federal court. The prison regulation in the Tennessee prison prevented inmates from advising or assisting one another in the preparation of habeas corpus petitions. Given the isolation of inmates from the general population, the rule had the effect, held the Court, of a rule which forbade illiterate or poorly educated prisoners from filing habeas corpus petitions. 89 S Ct at 749. In the absence of the provision of some other alternative, the regulation thus denied some prisoners access to the court in violation of *Hull*. *Avery* was then followed in *Wolff* v *McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974). Taking up the invitation of the Court in *Avery*, the Nebraska prison system precluded inmates from assisting one another generally in the preparation of petitions for habeas corpus and civil rights actions, instead providing an alternative, an inmate legal advisor, appointed by the Warden. The Court held that *Avery* extends to civil rights petitions as well as habeas corpus petitions, and directed that the district court hold a hearing to determine the adequacy of the assistance provided by the inmate legal advisor "under the reasonable-alternative standard of *Avery*." 94 S Ct at 2986. Other than the extension to civil rights actions, the rationale of the decision was precisely that of *Avery*--avoidance of the denial to an illiterate or poorly educated inmate of the ability to file a civil rights action. Then came *Bounds* v *Smith*, 430 US 817, 97 S Ct 1491, 52 L Ed 2d 72 (1977), to be repudiated in part in *Lewis* v *Casey*, supra.

Bounds conflated *Griffin/Douglas* line of cases, decided, as has been discussed, on an equal protection theory which the Court had made clear *in Davis* was no longer the law, those cases and their validity not being, however, before the Court in *Davis*, with the *Hull/Avery/Wolff* line of cases,

decided on the due process theory that access to the federal courts to file original habeas corpus petitions and original civil rights actions cannot be "abridged or impaired" by the State, but providing no obligation of affirmative assistance on the State, 97 S Ct at 1495, to invent an affirmative obligation on the part of the State to provide either an adequate law library for inmate use or some reasonable alternative, such as the assistance of "persons trained in the law." 97 S Ct at 1498. The Chief Justice, Justice Rehnquist, and Justice Stewart dissented, Justice Rehnquist arguing that the Court had created the right it was announcing "virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived." 97 S Ct at 1503.

The Court drew back to a degree, however, in *Lewis* v *Casey*, supra. Inmates in the Arizona Department of Corrections filed a federal lawsuit pursuant to *Bounds* on the ground that the legal assistance provided by the prison system was inadequate. The federal district court entered an injunctive order specifying in minute detail the hours for the prison library, the hours of use of the library per week to which an inmate was entitled, the minimum educational requirements for the prison librarians (a library science, paralegal, or law degree), the content of a videotaped legal-research course for inmates which the court required be prepared, the regulations for access to the library by prisoners in disciplinary or security segregation, that illiterate and non-English speaking inmates be provided direct assistance from lawyers, paralegals, or a sufficient number of prisoner legal assistants, that bilingual inmates be located and trained as legal assistants, and the like. The Supreme Court reversed.

The Court agreed with the State that the systemic challenge of the inmates was unsupported by the record, their being no proof of widespread actual injury under *Bounds*, the district court doing no more than identifying isolated instances of injury. But beyond this the Court also retreated from *Bounds*, remarking that:

> it must be acknowledged that several statements in *Bounds* went beyond the right of

> access recognized in the earlier cases on which it relied....These statements appear to suggest that the State must enable the prisoner to *discover grievances*. and to *litigate effectively* once in court....These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases. *and we now disclaim them*....the tools (*Bounds*) requires to be provided are those that the inmates need in order to attack their sentences. directly or collaterally. and in order to challenge the conditions of their confinement.

116 S Ct at 2181 (emphasis supplied).

Inmates do not have a right to become "litigating engines"–they have no right to the assistance of the State to help them "to discover grievances. and to litigate effectively once in court." *Lewis v Casey*. 116 S Ct at 2181. Rather. because of the "fundamental importance in our constitutional scheme" of the writ of habeas corpus. an original civil action in the federal courts. "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." See *Wolff v McDonnell*. 94 S Ct at 2985. Because the Court could find "no reasonable distinction" between the original action of a petition for writ of habeas corpus and a civil rights action. alleging constitutional error in the manner of treatment or confinement of a prisoner. the Court in *Wolff* held that *Avery* applies to civil rights actions. finding also in these cases that without some form of assistance through either legal assistants or the provision of a law library inmates' ability to have access to the courts to file these original actions is. as a practical matter. "impaired or obstructed." The right to counsel clearly is not required in these cases.

This right of access to the courts cannot. of course. belong only to inmates of correctional institutions. lodged there after a conviction. and who have no due process right to challenge their conviction further through an appellate process. but *must belong to the* ***innocent*** *as well–to* ***all*** *of us!*

The innocent. however. are not being held in custody. but may wish to bring. in certain circumstances. civil rights actions against the Government. Civil rights actions are scarcely the private domain of the criminally convicted. If a citizen wishes to bring a civil rights action against the Government he or she will not be forgiven the filing fee. will not be provided counsel. and will not be proved either a law library or provided a legal assistant. Can it be that those convicted of a crime and incarcerated have a right of access to the courts to file original actions challenging the actions of the Government superior to that of innocent citizens? How can this difference in treatment be explained?

Amicus submits that the difference in treatment can only sensibly be explained in one way. As has been explained. the Equal Protection Clause serves no function of "equalizing economic conditions" or opportunities. and so all ordinary citizens. at least hypothetically. have access to the courts. to legal assistants. and to law libraries in that *they are available* if one can avail him or herself of them. But an inmate. by virtue of his or her confinement. has no such hypothetical or possible access: he or she cannot visit a public library. or call upon friends and neighbors for legal advice. His or her access to the courts *to challenge an action or actions of the Government as it affects the inmate personally* is "abridged or restricted" by the *fact* of confinement. though the fact of that confinement be consistent with Due Process of Law.

To the extent there exists a right to "access to the courts." then. it perforce belongs to all citizens and not only inmates. and prevents civil rights actions against the Government from being "impaired or abridged." While for ordinary citizens the Government is under no duty to provide any affirmative assistance whatsoever to the citizen who sues or wishes to sue because that individual at least has the hypothetical opportunity to gain whatever legal assistance may be necessary. including through access to legal materials. the inmate lacks this hypothetical opportunity unless the Government assists him either through the provision of legal

materials or in some other manner–but the appointment of counsel is not required.

Conclusion

There can be no "Due Process" right to "meaningful access" to the appellate process. as liberty may be restrained consistent with Due Process of law after a criminal conviction without any appellate process. *Griffin. Douglas*. and *Moffitt* are in truth Equal Protection Clause cases. establishing a right to a transcript and the right to counsel on an *appeal of right*. but based on an equal protection theory *which has been firmly and repeatedly repudiated*. An equal protection violation requires a discriminatory motive. which is absent from these cases and from the present case.

This is a matter for the political branches of government. No provision of the Constitution can justify judicial intervention. unless we are to "render democratically adopted texts mere springboards for judicial lawmaking." Scalia. *A Matter of Interpretation*. p.25 (Princeton University Press. 1997).

RELIEF

WHEREFORE. amicus requests that certiorari be granted.

Respectfully submitted.

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research.
Training and Appeals

Supreme Court, U.S.
FILED
FEB 13 2004
OFFICE OF THE CLERK

No. 03-407

In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed September 12, 2003
Certiorari granted January 20, 2004

TABLE OF CONTENTS

Page

I. Relevant Docket Entries:
Tesmer, et al., v Kowalski, et al

1. United States Court of Appeals
for the Sixth Circuit, No. 00-1824,
appeal of Kowalski, Heathscott, and Crane.
(Consolidated with No. 00-1845,
appeal of Kolenda).....1a

2. United States Court of Appeals
for the Sixth Circuit,
No. 00-1845, appeal of Kolenda.
(Consolidated with No. 00-1824,
appeal of Kowalski, Heathscott, and Crane).....5a

3. United States District Court, Eastern District of
Michigan, No. 00-CV-10082.....8a

II. Opinions and Judgment Under Review

1. *Tesmer v Kowalski (on en banc rehearing)*,
333 F.3d 683 (6th Cir. 2003) Opinion
(Reproduced at Petition Appendix 1a-60a)
Judgment (Reproduced at Pet. App. 61a-62a)

2. *Tesmer v Kowalski*,
295 F.3d 536 (6th Cir, 2002)
Panel Opinion (Reproduced at Pet. App. 63a-84a)

3. *Tesmer v Kowalski*,
307 F 3d 459 (6th Cir, 2002)
Order Granting Rehearing en banc
(Reproduced at Pet. App. 85a-86a)

4. *Tesmer v Granholm*,
114 F. Supp. 2d 603 (ED Mich, 2000)
March 31, 2000 Decision (Reproduced at Pet. App. 87a-124a)

5. *Tesmer v Kowalski*,
114 F. Supp. 2d 622 (ED Mich, 2000)
June 30, 2000 Decision (Reproduced at Pet. App. 125a-136a)

III. Other

1. Complaint Entered 03/06/00.....11a-21a

2. Exhibit B to Plaintiffs' Motion for Preliminary Injunction (Examples of Michigan Court of Appeals Orders Denying Applications for Leave to Appeal, Entered 03/06/00.....22a-27a

3. Exhibit A to Plaintiffs' Response to Defendants' Motion to Dismiss (Declaration of Plaintiff Charles Carter), Entered 03/27/00.....28a

4. Exhibit A to Plaintiffs' Brief in Opposition to Defendants' Motion to Stay (Affidavit of Terence R. Flanagan), Entered 04/27/00.....29a-30a

5. Constitutional Provisions, Statutes, and Court Rules Involved (Reproduced at Pet. App. 137a-159a)

Federal
US Const., Amend. 14, § 1 (Pet. App. 137a)
28 USC § 1331 (Pet. App. 137a)
28 USC § 1343 (Pet. App. 137a)
42 USC § 1983 (Pet. App. 138a)

Michigan
Michigan Constitution of 1963 (Pet. App. 138a)

Michigan Compiled Laws
MCL 770.3(1) 770.3 (Pet. App. 139a)
MCL 770.3a (Pet. App. 139a)

Michigan Court Rules
MCR 6.005 (Pet. App. 141a)
MCR 6.300 (Pet. App. 145a)
MCR 6.302 (Pet. App. 146a)
MCR 6.303 (Pet. App. 149a)
MCR 6.304 (Pet. App. 149a)
MCR 6.310 (Pet. App. 150a)
MCR 6.311 (Pet. App. 150a)
MCR 6.312 (Pet. App. 151a)
MCR 6.425 Sentencing; Appointment of Appellate Counsel.....31a-36a
MCR 7.203 (Pet. App. 151a)
MCR 7.205 (Pet. App. 152a)
MCR 7.301 (Pet. App. 158a)

6. State Court Administrative Office (SCAO) form: "Application For Leave To Appeal After Sentencing On Plea Of Guilty Or Nolo Contendere" (Reproduced at Pet. App. 160a-170a)

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 00-1824 Filed: 7/26/00
Nsuit: 3440 Civil Rights: Other
Tesmer, et al v. Granholm, et al
Appeal from: Eastern District of Michigan at Bay City

- -

Case type information:
1) Civil
2) private
3) federal question

- -

Lower court information:

District: 0645-1 : 00-10082
Court Reporter: Barbara Chatman
Trial Judge: Victoria A. Roberts, District Judge
Court Reporter: Shaun Quinn
Trial Judge: David M. Lawson, District Judge
Date Filed: 3/2/00
Date order/judgment: 7/3/00
Date NOA filed: 7/14/00

- -

Fee status: paid

- -

* * *

Current cases:

	Lead	Member	Start	End
Related:				
	00- 1824	00- 1845	8/8/02	8/13/03

* * *

- -

00-1824 Tesmer, et al v. Granholm, et al

JOHN TESMER; CHARLES CARTER; ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals; ARTHUR M. FITZGERALD; MICHAEL D. VOGLER

Plaintiffs - Appellees

v.

JENNIFER M. GRANHOLM, Attorney General;

Defendant

JOHN F. KOWALSKI, Judge; WILLIAM A. CRANE, Judge; LYNDA L.
HEATHSCOTT, Judge, in their official capacities, individually and as representatives of a class of similarly situated circuit court judges

Defendants - Appellants

* * *

00-1824 Tesmer, et al v. Granholm, et al

7/26/00 Civil Case Docketed. Notice filed by Appellee Arthur M. Fitzgerald [sic, Should be: Appellant John F. Kowalski,], Appellant William A. Crane, Appellant Lynda L. Heathscott. Transcript needed: y (dtk)

* * *

8/28/00 Appellant MOTION filed to stay district court proceeding . Motion filed by Judy E. Bregman for Appellant Dennis C. Kolenda in 00-1845 . Certificate of service date 8/24/00 [00-1845] (dtk)

* * *

11/1/00 ORDER filed granting motion to stay district court proceeding and the June 30, 2000, injunction against Judge Kolenda is stayed pending further

court order [2212095-1] filed by Judy E. Bregman [00-1845]. Ralph B. Guy, Richard F. Suhrheinrich, and Karen N. Moore, Circuit Judges. (dtk) (ert)

* * *

7/2/02 JUDGMENT: Injunction of the district court is DISSOLVED, the district court's declaratory judgment is VACATED and the case is REMANDED with instructions to enter judgment in favor of defendants [00-1824, 00-1845] (ert)

* * *

7/11/02 PETITION for en banc rehearing filed by David A. Moran for Appellees Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer. Certificate of service date 7/10/02. [00-1824, 00-1845] (blh)

* * *

9/20/02 ORDER filed granting petition for en banc rehearing [2582617-1] filed by David A. Moranan [sic] to reinstate appeal. The previous decision and judgment of this court is vacated,the mandate is stayed. [00-1824, 00-1845] Boyce F. Martin, Chief Circuit Judge; Danny J. Boggs, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, Circuit Judges. (blh)

* * *

6/17/03 OPINION filed : The district court's judgment is AFFIRMED IN PART and REVERSED IN PART. Decision for publication pursuant to local rule 206 [00-1824, 00-1845] . Boyce F. Martin, Chief Authoring Judge in which Danny J. Boggs, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, and Ronald L. Gilman joined. John M. Rogers delivered a separate opinion concurring and dissenting in part, in which , Eugene E. Siler, Alice M. Batchelder and Julia S. Gibbons joined. Alan E. Norris delivered a separate dissenting opinion in

which Eugene E. Siler, Alice M. Batchelder, and Julia S. Gibbons, joined. (dtk)

6/17/03 JUDGMENT : AFFIRMED in part and REVERSED in part. (dtk)

7/9/03 MANDATE ISSUED with no cost taxed [00-1824] (rgf)

* * *

General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 00-1845 Filed: 7/31/00
Nsuit: 3440 Civil Rights: Other
Tesmer, et al v. Granholm, et al
Appeal from: Eastern District of Michigan at Bay City

- -

Case type information:
1) Civil
2) private
3) federal question

- -

Lower court information:

District: 0645-1 : 00-10082
Court Reporter: Shaun Quinn
Court Reporter: Barbara Chatman
Trial Judge: Victoria A. Roberts, District Judge
Trial Judge: David M. Lawson, District Judge
Date Filed: 3/2/00
Date order/judgment: 7/3/00
Date NOA filed: 7/18/00

- -

Fee status: paid

- -

* * *

Current cases:

	Lead	Member	Start	End
Related:				
	00- 1824	00- 1845	8/8/02	8/13/03

* * *

00-1845 Tesmer, et al v. Granholm, et al

7/31/00 Civil Case Docketed. Notice filed by Appellant Dennis C. Kolenda. Transcript needed: y (dtk)

* * *

8/28/00 Appellant MOTION filed to stay district court proceeding . Motion filed by Judy E. Bregman for Appellant Dennis C. Kolenda in 00-1845 . Certificate of service date 8/24/00 [00-1845] (dtk)

* * *

11/1/00 ORDER filed granting motion to stay district court proceeding and the June 30, 2000, injunction against Judge Kolenda is stayed pending further court order [2212095-1] filed by Judy E. Bregman [00-1845] . Ralph B. Guy, Richard F. Suhrheinrich, and Karen N. Moore, Circuit Judges. (dtk)

* * *

7/2/02 OPINION filed: injunction issued by the district court is DISSOLVED, the district court's declaratory judgment is VACATED and the case is REMANDED with instructions to enter judgment in favor of defendants [00-1824, 00-1845], decision for publication pursuant to local rule 206 [00-1824, 00-1845] . Alan E. Norris, Authoring Judge, Eugene E. Siler, Alice M. Batchelder, Circuit Judges. (ert)

* * *

7/11/02 PETITION for en banc rehearing filed by David A. Moran for Appellees Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer. Certificate of service date 7/10/02. [00-1824, 00-1845] (blh)

* * *

9/20/02 ORDER filed granting petition for en banc rehearing [2582617-1] filed by David A. Moranan [sic] to reinstate appeal. The previous decision and judgment of this court is vacated,the mandate is stayed. [00-1824, 00-1845] Boyce F. Martin, Chief Circuit Judge; Danny J. Boggs, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore,

R. G. Cole, Eric L. Clay, Ronald L. Gilman, Julia S. Gibbons, Circuit Judges. (blh)

* * *

6/17/03 OPINION filed : The district court's judgment is AFFIRMED IN PART and REVERSED IN PART. Decision for publication pursuant to local rule 206 [00-1824, 00-1845] . Boyce F. Martin, Chief Authoring Judge in which Danny J. Boggs, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, and Ronald L. Gilman joined. John M. Rogers delivered a separate opinion concurring and dissenting in part, in which , Eugene E. Siler, Alice M. Batchelder and Julia S. Gibbons joined. Alan E. Norris delivered a separate dissenting opinion in which Eugene E. Siler, Alice M. Batchelder, and Julia S. Gibbons, joined. (dtk)

6/17/03 JUDGMENT : AFFIRMED in part and REVERSED in part . (dtk)

7/9/03 MANDATE ISSUED with no cost taxed [00-1845] (rgf)

* * *

U.S. District Court
for the Eastern District of Michigan (Bay City)
CIVIL DOCKET FOR CASE #: 00-CV-10082
Tesmer, et al v. Granholm, et al
Filed: 03/02/00

* * *

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
3/2/00	1	COMPLAINT - Receipt # 395248 - Date Fee Received: 03/02/00 (bs) [Entry date 03/06/00]
3/2/00	2	MOTION by plaintiffs for preliminary injunction with Exhibits, brief, notice of hearing with date to be set by the court and proof of mailing. (bs) [Entry date 03/06/00]

* * *

3/23/00	6	MOTION by defendants to dismiss (bs) [Entry date 03/23/00]

* * *

3/27/00	13	RESPONSE by plaintiff to motion to dismiss by Lynda L. Heathscott, William A. Crane, John F. Kowalski, Jennifer M. Granholm [6-1] with brief and attachments. (bs) [Entry date 03/29/00]
3/28/00	14	REMARK: Supplemental Authority with Exhibit A filed by plaintiffs. (bs) [Entry date 03/30/00]

* * *

3/31/00	17	MEMORANDUM opinion and order by Judge Victoria A. Roberts granting in part and denying in part motion to dismiss by Lynda L. Heathscott, William A. Crane, John F. Kowalski, Jennifer M. Granholm [6-1], denying motion for preliminary injunction by Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer [2-1] and granting plaintiffs' request for declaratory judgment [EOD Date: 4/4/00] (bs) [Entry date 04/04/00]

* * *

4/14/00	24	MOTION by defendant John F. Kowalski, defendant William A. Crane, defendant Lynda L. Heathscott to stay case with brief, attachments and proof of mailing (jl) [Entry date 04/14/00]

* * *

4/27/00	28	MEMORANDUM by plaintiffs in opposition to motion to stay case by Lynda L. Heathscott, William A. Crane, John F. Kowalski [24-1]; with attachments and proof of mailing. (bs) [Entry date 05/01/00]

* * *

6/20/00	31	ORDER by Judge Victoria A. Roberts denying motion to stay case by Lynda L. Heathscott, William A. Crane, John F. Kowalski [24-1], setting hearing on motion for injunction by Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer [29-1] for 10:00 6/28/00, and setting deadline for plaintiff's supplemental brief for 10:00 6/23/00, setting deadline for defendant's supplemental brief for 10:00 6/26/00 Date 6/22/00] (jl) [Entry date 06/22/00]

* * *

6/30/00	33	MEMORANDUM opinion and order by Judge Victoria A. Roberts granting motion for injunction by Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer [29-1], denying motion to certify class action by Michael D. Vogler, Arthur M. Fitzgerald, Alois Schnell, Charles Carter, John Tesmer [18-1]; with

proof of mailing. [EOD Date: 7/3/00] (bs) [Entry date 07/03/00]

* * *

7/14/00 35 INTERLOCUTORY appeal by defendant Lynda L. Heathscott, defendant William A. Crane, defendant John F. Kowalski of order [33-1] to USCA FEE: paid Receipt # 200 402249 (bs) [Entry date 11/29/01] [Edit date 11/29/01]

* * *

7/18/00 39 INTERLOCUTORY appeal of order [33-1] by the Honorable Dennis C. Kolenda to USCA FEE: paid Receipt # 200 402379 (bs) [Entry date 11/29/01]

* * *

7/8/02 63 SLIP opinion from USCA remanding the case for to have judgment entered in favor of the defendants, injunction issued by the court is dissolved and the declaratory judgment is vacated - appeal case # 00-1824, 00-1845 (bs) [Entry date 07/08/02]

* * *

6/20/03 66 SLIP opinion from USCA affirming in part and reversing in part the decision of the District Court - appeal case # 00-1824/1845 (bs) [Entry date 06/20/03]

* * *

7/14/03 68 MANDATE from USCA affirming the decision of the District Court in part and reversed in part - appeal case # 00-1824 (bs) [Entry date 07/14/03]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN CLIFFORD TESMER, CHARLES CARTER, and ALOIS SCHNELL, on behalf of themselves and all similarly situated individuals, and ARTHUR M. FITZGERALD and MICHAEL D. VOGLER,

Plaintiffs,

v

Case No. 00-10082
Hon. Victoria A. Roberts
Magistrate Judge Binder

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, in her official capacity; and JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A CRANE and JUDGE LYNDA L. HEATHSCOTT, in their official capacity, individually and as representative of a class of similarly situated circuit court judges,

Defendants.

_____/

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named Defendants, their employees, agents, and successors in office and, in support thereof, state the following upon information and belief:

INTRODUCTORY STATEMENT

1. This civil rights action, arising under 42 U.S.C. §1983, challenges the constitutionality of the practice of denying indigent defendants who have pleaded guilty or nolo contendere in Michigan courts the right to appointed appellate counsel. This practice of denying appointed appellate counsel to indigents who have pleaded guilty or nolo contendere has also been recently codified by the enactment of P.A. 1999, No. 200, an act which is scheduled to take effect on April 1, 2000.

2. Plaintiffs seek declaratory and injunctive relief against both the existing practice in some Michigan courts and the practice which will take effect statewide on April 1, 2000 under P.A. 1999, No. 200.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1342(a)(3), and 1343(a)(4).

4. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

5. Venue is appropriate under 28 U.S.C. § 1392(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

6. Plaintiff John Clifford Tesmer is a resident of the County of Alcona who is presently incarcerated in the Saginaw Correctional Facility. He brings this suit on behalf of himself and all other persons similarly situated.

7. Plaintiff Charles Carter is a resident of the County of Saginaw who is presently incarcerated at the State Prison of

Southern Michigan. He brings this suit on behalf of himself and all other persons similarly situated.

8. Plaintiff Alois Schnell is a resident of the County of Saginaw who is presently incarcerated at the Cotton Correctional Facility. He brings this suit on behalf of himself and all other persons similarly situated.

9. Plaintiff Arthur M. Fitzgerald is an attorney licensed to practice law in the State of Michigan. Mr. Fitzgerald's principal place of business is located in Bay County, Michigan.

10. Plaintiff Michael D. Vogler is an attorney licensed to practice law in the State of Michigan. Mr. Vogler's principal place of business is located in Presque Isle County, Michigan.

11. Defendant Jennifer M. Granholm is the Attorney General of the State of Michigan. She will be responsible for the enforcement of P.A. 1999, No. 200. Defendant Granholm is sued herein in her official capacity, as are her successors.

12. Defendant John F. Kowalski is a judge of the State of Michigan's 26th Circuit Court. He is being sued herein in his official capacity and as a class representative of all circuit court judges in the State of Michigan.

13. Defendant William A. Crane is a judge of the State of Michigan's 10th Circuit Court. He is being sued herein in his official capacity and as a class representative of all circuit court judges in the State of Michigan.

14. Defendant Lynda L. Heathscott is a judge of the State of Michigan's 10th Circuit Court. She is being sued herein in her official capacity and as a class representative of all circuit court judges in the State of Michigan.

FACTUAL BACKGROUND

15.In November 1994, article 1, §20 of the Michigan Constitution was amended to provide that the first direct appeal from a plea-based felony conviction would be by application for leave to appeal filed in the Michigan Court of Appeals.

16. The 1994 amendment to article 1, §20 of the Michigan Constitution changed the procedure for initial appeals of a plea-based felony conviction from appeals of right to appeals only by leave of the Court of Appeals.

17. The 1994 amendment of article 1, §20 of the Michigan Constitution did not address the appointment of counsel by which indigents who had pleaded guilty or nolo contendere to felony charges could challenge their convictions or sentences.

18. Some time after the 1994 amendment of article 1, §20 of the Michigan Constitution, a number of circuit court judges, particularly the judges of the 10th Circuit Court in Saginaw, began routinely denying requests filed by indigent defendants for the appointment of appellate counsel to prepare applications for leave to appeal in the Michigan Court of Appeals to challenge plea-based convictions and sentences.

19. Plaintiff John Clifford Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion in the 26th Circuit Court in Alcona.

20. Judge John F. Kowalski sentenced Mr. Tesmer to a period of incarceration of between 9 and 15 years based on his plea of guilty to the home invasion charge.

21. Within 42 days of the date of his sentencing, Mr. Tesmer presented a written request to Judge Kowalski for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

22. On September 7, 1999, Judge Kowalski denied Mr. Tesmer's request for appointed appellate counsel.

23. Plaintiff Charles Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder in the 10th Circuit Court in Saginaw.

24. Judge William A. Crane sentenced Mr. Carter to life imprisonment based on his plea of guilty to the attempted murder charge.

25. Within 42 days of the date of his sentencing, Mr. Carter presented a written request to Judge Crane for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

26. On May 12, 1999, Judge Crane denied Mr. Carter's request for appointed appellate counsel.

27. Plaintiff Alois Schnell is an indigent who pleaded guilty in 1998 to the charge of operating a vehicle under the influence of liquor (OUIL), third offense.

28. Judge Lynda L. Heathscott sentenced Mr. Schnell to a period of incarceration of between five and ten years based on his plea of guilty to the OUIL charge.

29. Within 42 days of the date of his sentencing, Mr. Schnell presented a written request to Judge Heathscott for the appointment of an appellate attorney to prepare an application for leave to appeal in the Michigan Court of Appeals from his plea-based conviction.

30. On September 21, 1998, Judge Heathscott denied Mr. Schnell's request for appointed appellate counsel.

31. In December 1999, P.A. 1999, No. 200 was signed into law. This act, which amends provisions of Michigan's Code of Criminal Procedure, takes effect on April 1, 2000.

32. Under P.A. 1999, No. 200, an indigent who pleads guilty or nolo contendere to a felony charge has the right to appointed counsel to file an application for leave to appeal in only a limited number of circumstances. P.A. 1999, No. 200 also prohibits circuit court judges from appointing counsel to indigent defendants in most cases in which these defendants have pleaded guilty or nolo contendere.

33. Plaintiff Arthur M. Fitzgerald earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions. Mr. Fitzgerald is on a list of attorneys qualified to take such assignments arising out of the State of Michigan's 10th Circuit Court.

34. Plaintiff Michael D. Vogler earns a portion of his income as an attorney taking assigned appeals from trial and plea based convictions. Mr. Vogler is on a list of attorneys qualified to take such assignments arising out of the State of Michigan's 26th Circuit Court.

35. The present practice in several Michigan courts of routinely denying requests for appointment of appellate counsel made by indigent defendants who have pleaded guilty or nolo contendere has adversely affected the incomes of Mr. Fitzgerald and Mr. Vogler in that it has reduced the number of cases in which they could be appointed and paid as assigned appellate counsel.

36. The operation of P.A. 1999, No. 200 will adversely affect the incomes of Mr. Fitzgerald and Mr. Vogler in that it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel.

37. Mr. Fitzgerald and Mr. Vogler also assert, under the doctrine of *jus tertii*, the constitutional rights of the indigent criminal defendants who will plead guilty or nolo contendere after April 1, 2000, and who will request, but be denied, the appointment of appellate counsel, based on the operation of P.A. 1999, No. 200.

FIRST CLAIM FOR RELIEF

38. Plaintiffs incorporate by reference all of he allegations contained above as though stated in full herein.

39. Defendants Kowalski, Crane and Heathscott violated Plaintiffs' rights to due process and equal protection rights as guaranteed by the United States Constitution when they denied Plaintiffs and all similarly situated individuals the right to the appointment of appellate counsel to prepare an original appeal from their plea-based convictions.

40. Defendants Kowalski, Crane and Heathscott took the aforementioned actions denying the constitutional rights of the Plaintiffs and all similarly situated individuals while acting under color of state law.

41. Plaintiffs seek redress for the Defendants' violation of federal constitutional rights pursuant to the federal civil rights act, 42 U.S.C. §1983.

SECOND CLAIM FOR RELIEF

42. Plaintiffs incorporate by reference all of the allegations contained above as though stated in full herein.

43. By denying indigent defendants the right to appointed appellate counsel to process their initial appeal, P.A. 1999, No 200 will violate due process and equal protection rights guaranteed by the United States Constitution.

44. The violations of federal constitutional rights described in the preceding paragraph will result from actions taken under color of state law.

45. Plaintiffs seek redress for the violation of federal constitutional rights caused by the operation of P.A. 1999, No. 200 pursuant to the federal civil rights act, 42 U.S.C. §1983.

CLASS ALLEGATIONS

46. The Plaintiff class consists of all indigent Defendants who have pleaded or will plead guilty or nolo contendere to a felony in a Michigan court and who filed or will file a request for the appointment of appellate counsel which was or will be denied by a circuit court judge.

47. This proposed class meets the requirements of F.R.C.P. 23(a) and (b) because:

A. The class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representative parties will adequately protect the interests of the class.

B. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications or adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants.

C. The parties opposing the class have in refusing to appoint appellate counsel, acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

48. The Defendant class consists of all Michigan circuit court judges and their successors.

49. This proposed Defendant class meets the requirements of F.R.C.P. 23(a) and (b) because:

A. The class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims against the representative parties are typical of the claims against the class as a whole, and the representative parties will adequately protect the interests of the class.

B. The prosecution of separate actions against individual members of the class would create a risk of varying adjudications or adjudications with respect to individual members of the class which would establish incompatible standards of conduct for parties opposing the class.

C. The named class representatives, in refusing to appoint appellate counsel, acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

RELIEF REQUESTED

WHEREFORE, Plaintiffs ask this Court to do the following:

A. Issue an order declaring that the practice of Defendants Kowalski, Crane, Heathscott and other similarly situated circuit court judges, denying individuals who have pleaded guilty or nolo contendere the right to appointed appellate counsel to handle an initial appeal, violates the United States Constitution;

B. Issue a temporary restraining order, a preliminary injunction and a permanent injunction restraining the Defendants, and all other members of the Defendant class, as well as their employees, agents, and successors from violating the federal constitutional rights of Plaintiffs and the Plaintiff class;

C. Issue an order declaring that P.A. 1999, No. 200 violates the United States Constitution;

D. Issue a temporary restraining order, a preliminary injunction and a permanent injunction enjoining the enforcement of P.A. 1999, No. 200;

E. Issue an order specifying that Plaintiffs and the members of the Plaintiff class shall be provided appointed counsel to file an application for leave to appeal to the Michigan Court of Appeals and that the Court of Appeals must accept any application for leave to appeal filed by Plaintiffs' appointed counsel for filing and

must give full consideration to that application;

F. Issue an order awarding Plaintiffs their reasonable attorney fees and costs;

G. Issue other orders awarding Plaintiffs any other relief to which they may be entitled.

/S/
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Attorneys for Plaintiff

Dated: March 1, 2000

Court of Appeals, State of Michigan

ORDER

People of MI v Christopher Lee Cascagnett

Docket No. 218806

LC No.98-007505 FH

Donald E. Holbrook, Jr.
Presiding Judge
Kathleen Jansen
E. Thomas Fitzgerald
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Donald E. Holbrook, Jr.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court seal omitted in printing.]

June 10, 1999
Date

/S/
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v PAULA DENISE GOREE

Docket No. 219224

LC No.95-004818 FH; 96-005979 FH

Michael R. Smolenski
Presiding Judge
David H. Sawyer
Janet T. Neff
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Michael R. Smolenski

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court seal omitted in printing]

July 27, 1999
Date

/S/
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Mark Owen Wade

Docket No. 221156

LC No.980000336 FC

Peter D. O'Connell
Presiding Judge
Kathleen Jansen
Henry William Saad
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Peter D. O'Connell

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court Seal omitted in printing.]

September 2, 1999
Date

/S/
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Matthew Davis Harton

Docket No. 221550

LC No.97-020389 FC

Stephen J. Markman
Presiding Judge
E. Thomas Fitzgerald
Hilda R. Gage
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Stephen Markman

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court Seal omitted in printing.]

September 29, 1999
Date

/S/
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Steven Duane Clark

Docket No. 22388

LC No.97-408635-FH

Richard Allen Griffin
Presiding Judge
Peter D. O'Connell
Donald S. Owens
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Richard Allen Griffin
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court seal omitted in printing.]

February 23, 2000
Date

/S/
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Jimmie Lee Montgomery

Docket No. 224038

LC No.98-9216

Helen N. White
Presiding Judge
Michael T. Talbot
Jeffrey G. Collins
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/S/
Helen N. White

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[Court seal omitted in printing.]

February 28, 2000
Date

/S/
Chief Clerk

[Original Document Handwritten]

DECLARATION OF CHARLES CARTER

I do not have a lawyer to represent me for free.

2. I have not filed an appeal because I cannot afford a lawyer.

3. I do not know how to represent myself.

4. I don't know the law and I don't have any one to help me.

5. I made it to the 10th grade, I had special ed reading class.

6. My family can not hire a lawyer for me.

7. I was sentence to Life for atemted murder.

Charles Carter Date 3-26-2000

AFFIDAVIT

Terence R. Flanagan, being first duly sworn, states that he has personal knowledge of the facts contained herein and that, if called as a witness to testify at trial or hearing in this matter, would be competent to testify to and would testify as follows.

1. I am the Administrator of the Michigan Appellate Assigned Counsel System (MAACS), the state agency which oversees the appointment of assigned counsel to represent indigent defendants in appeals in the Michigan state courts.

2. That each circuit court provides MAACS with copies of orders granting the appointment of appellate counsel in either trial or plea-based appeals. Courts are also supposed to provide MAACS with copies of orders denying counsel in such appeals but Saginaw Circuit does not. Information concerning denials of counsel in plea-based appeals from Saginaw has been received from the defendants involved who contacted MAACS, not from the Saginaw Circuit directly.

3. That in the period from January 1-December 31, 1999, MAACS received copies of 1,892 orders from circuit judges appointing appellate counsel in plea-based appeals. MAACS also received copies of 165 orders from circuit judges and/or defendants, including five from Saginaw (James Morrison, Charles Carter, Joseph Boatman, Vincent Kinsel and Calvin Jackson) denying counsel in plea-based appeals.

4. That, according to the information provided by Saginaw Circuit to MAACS, the rate of pay for attorneys on a plea-based appeal is $350, plus $100 for conducting an interview with the defendant at a prison. Expenses are included. This fee was set in 1985 and, to my knowledge, has not changed.

/S/
Terence R. Flanagan

Subscribed and sworn to before me
April 21, 2000

/s/
Judy A. Miller
Notary Public, Ionia County
Acting in Ingham County
My Commission expires: 07/21/2000

Michigan Court Rules.

MCR 6.425 Sentencing; Appointment of Appellate Counsel
(A) Presentence Report; Contents. Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:
(1) a description of the defendant's prior criminal convictions and juvenile adjudications,
(2) a complete description of the offense and the circumstances surrounding it,
(3) a brief description of the defendant's vocational background and work history, including military record and present employment status,
(4) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,
(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,
(6) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,
(7) if provided and requested by the victim, a written victim's impact statement as provided by law,
(8) any statement the defendant wishes to make,
(9) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,
(10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,
(11) a specific recommendation for disposition, and
(12) any other information that may aid the court in sentencing.
Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is

sentenced to prison, the copies must be sent with the commitment papers.
(B) Presentence Report; Disclosure Before Sentencing. The court must permit the prosecutor, the defendant's lawyer, and the defendant to review the presentence report at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.
(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).
(D) Imposition of Sentence.
(1) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator.
(2) Sentencing Procedure. The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing the court, complying on the record, must:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,
(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (D)(3),
(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,
(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,
(e) articulate its reasons for imposing the sentence given, and
(f) if a victim of the crime has suffered harm and the court does not order restitution as provided by law or orders only partial restitution, state the reasons for its action.
(3) Resolution of Challenges. If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to
(a) correct or delete the challenged information in the report, whichever is appropriate, and
(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.
(E) Advice Concerning the Right to Appeal; Appointment of Counsel.
(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,
(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and
(c) the request for a lawyer must be made within 42 days after sentencing.
(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that
(a) the defendant is entitled to file an application for leave to appeal;
(b) if the defendant is financially unable to retain a lawyer, the court must appoint a lawyer to represent the defendant on appeal if
(i) the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines,
(ii) the defendant seeks leave to appeal a conditional plea under MCR 6.301(C)(2),
(iii) the prosecuting attorney seeks leave to appeal, or
(iv) the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal;
(c) if the defendant is financially unable to retain a lawyer, the court, in its discretion, may appoint a lawyer to represent the defendant on appeal if all the following apply:
(i) the defendant seeks leave to appeal on the basis of an alleged improper scoring of an offense variable or a prior record variable,
(ii) the defendant objected to the scoring or otherwise preserved the matter for appeal, and
(iii) the sentence constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored; and
(d) the request for a lawyer must be made within 42 days after sentencing, unless the entitlement to counsel arises under (b)(iii) or (iv).

With regard to paragraphs (b) and (c), the court is required to give only the advice that is applicable to the particular circumstances.
Upon sentencing, the court shall give the defendant a form developed by the State Court Administrative Office that the defendant may complete and file as an application for leave to appeal.
(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The 42-day time limit does not apply if the entitlement to counsel arises under subrule (2)(b)(iii) or (iv).
(4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq.*, are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.
(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.
(1) Appointment of Lawyer.
(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.
(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant
(i) in available postconviction proceedings in the trial court the lawyer deems appropriate,
(ii) in postconviction proceedings in the Court of Appeals,
(iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and
(iv) as appellee in relation to any postconviction appeal taken by the prosecutor.
(2) Order to Prepare Transcript. The appointment order also must
(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,
(i) the trial or plea proceeding transcript,
(ii) the sentencing transcript, and
(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and
(b) provide for the payment of the reporter's fees.
The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System.
(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in (F)(1) and (2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (F)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.
(Current as of 1/01/2004)

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No. 03-407

Supreme Court, U.S.
FILED
APR 2 - 2004
OFFICE OF THE CLERK

In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners.

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

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Attorneys for Petitioners

QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, § 20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that a criminal defendant who pleads guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

II. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

PARTIES TO THE PROCEEDING

In the courts below, the plaintiffs challenging the constitutionality of the Michigan statute were three indigent criminal defendants, Respondents John Tesmer, Charles Carter, and Alois Schnell, and two criminal defense attorneys, Respondents Arthur Fitzgerald and Michael D. Vogler.

The defendants below and the Petitioners here are three Michigan State Court Judges, John F. Kowalski, William A. Crane, and Lynda L. Heathscott.

The then Attorney General of Michigan, Jennifer M. Granholm, was initially named as a defendant but was dismissed by the District Court, was not a party to the appeal below, and pursuant to S Ct R 12.6 Petitioners believe she has no interest as a party in the outcome of this Petition.

The District Court entered an opinion and order on March 31, 2000, declaring the State statute unconstitutional.

On June 30, 2000, the District Court entered an injunction against Petitioner Heathscott; against another State Judge, Respondent Dennis C. Kolenda, who was not a party to the lawsuit; and purportedly against all other Michigan State Judges. The interests of Respondent Judge Kolenda are not adverse to the interests of Petitioners.

Petitioners Judges Kowalski, Crane, and Heathscott, appealed to the United States Court of Appeals for the Sixth Circuit in case No. 00-1824. Respondent Judge Kolenda filed a separate appeal in case No. 00-1845. The Court of Appeals issued a joint *en banc* opinion and judgment on rehearing in the two appeals on June 17, 2003.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW xiii

JURISDICTION xiii

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED xiv

STATEMENT OF THE CASE 1

A. The Michigan Framework For Appeals From Guilty Pleas. 2

B. The Present Lawsuit 4

C. Proceedings Below 6

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. Attorneys Whose Only Personal Stake Is The Speculative Loss Of Potential Future Income Do Not Have Third-Party Standing To Allege Violation Of The Constitutional Rights Of Potential Future Clients 12

A. To Have Third-Party Standing, (i) The Litigant Must Have Suffered An "Injury In Fact"; (ii) The Litigant Must Have A Close Relation To The Third Party; and (iii) There Must Exist Some Hindrance To The Third Party's Ability To Protect Its Own Interests 13

1. Respondent Attorneys Have Not Suffered An "Injury In Fact." 14

2. Respondent Attorneys Do Not Have A Sufficiently Close Relation To Unknown Potential Indigent Defendants Who Might Be Injured By Operation Of The Michigan Statute 17

3. Future Indigent Criminal Defendants Are Not Hindered From Protecting Their Own Interests. ... 21

B. The Court Of Appeals' Misapplication Of This Court's Criteria For Third-Party Standing Fundamentally Expands The Doctrine 24

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions. 27

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Pleas. 30

B. Defendants Who Plead Guilty Have An Adequate Opportunity To Present Their Claims Fairly And Receive A Meaningful Appeal. 35

C. Orders Of The Michigan Court Of Appeals Denying Applications For Leave To Appeal Are Discretionary And Are Not Decisions On The Merits Of The Legal Issues. 37

CONCLUSION 47

TABLE OF AUTHORITIES

Cases

Baird v Eisenstadt,
429 F 2d 1398 (1st Cir 1970) 18

Baker v Carr,
369 US 186 (1962) 16

Barrows v Jackson,
346 US 249 (1953) 20

Beulah Missionary Baptist Church v Spann,
132 Mich App 118; 346 NW 2d 911 (1984) 42

Brady v United States,
397 US 742 (1970) 30, 31

Broadrick v Oklahoma,
413 US 601 (1973) 15

Bulger v Curtis,
USDC, ED Mich No. 00-CV-10476-BC 22

Caplin & Drysdale, Chartered v United States,
491 US 617 (1989) ..... passim

Carey v Population Services International,
431 US 678 (1977) 20, 21

Conn v Gabbert,
526 US 286 (1999) 17

Craig v Boren,
429 US 190 (1974) 20, 21

Doe v Bolton,
410 US 179 (1973) 23

Douglas v California,
372 US 353 (1963) 27, 37, 38

Eisenstadt v Baird,
405 US 438 (1972) 18, 19, 20, 21

Evitts v Lucey,
469 US 387 (1985) 38, 39

Frederick v Presque Isle County Circuit Judge,
439 Mich 1; 476 NW 2d 142 (1991) 4

Great Lakes Realty Corp v Peters,
336 Mich 325; 57 NW 2d 901 (1953) 40, 41, 42

Griffin v Illinois,
351 US 12 (1956) 28, 37, 46

Griswold v Connecticut,
381 US 479 (1965) 19, 21

Harris v Stoval,
212 F 3d 940 (6th Cir 2000) 44, 45

Hill v Lockhart,
474 US 52 (1985) 32

In re Guilty Plea Cases,
395 Mich 122; 235 NW2d 132 (1975) 31

Iowa v Tovar,
541 US ___; 124 S Ct 1379, Slip Opinion p 2 (2004) 32

Lujan v Defenders of Wildlife,
504 US 555 (1992) ..... passim

Malooly v York Heating & Ventilating Corp.,
270 Mich 240; 258 NW 622 (1935) 41

McKane v Durston,
153 US 684 (1894) 27

McKenzie v Smith,
326 F 3d 721 (6th Cir., 2003), cert den, 540 US ___; 124 S Ct 1145 (2004) 44, 45

McMann v Richardson,
397 US 759 (1970) 31

New York Central R.R. Co v White,
243 US 188 (1917) 16

Parker v North Carolina,
397 US 790 (1970) 31

People v Berry,
10 Mich App 469; 157 NW 2d 310 (1968) 41

People v Bulger,
462 Mich 495; 614 NW2d 103 (2000) *cert denied*, 531 US 994 (2000) ..... passim

People v Douglas,
122 Mich App 526; 332 NW 2d 521 (1983) 42

People v Hayden,
132 Mich App 273; 348 NW 2d 672 (1984) 42

People v Saffold,
465 Mich 268; 631 NW2d 320 (2001) 31

People v Tooson, (*In re Withdrawal of Attorney*),
231 Mich App 504; 231 NW 2d 504 (1998) 39

People v Wiley,
112 Mich App 344; 315 NW 2d 540 (1981) 42

Powers v Ohio,
499 US 400 (1991) ..... passim

Ridley v Grayson,
USDC, ED Mich No. 00-CV-73580-DT 22

Ross v Moffitt,
417 US 600 (1974) ..... passim

Sierra Club v Morton,
405 US 727 (1972) 15

Singleton v Wulff.,
428 US 106 (1976) 13, 24, 26

Smith v Robbins,
528 US 259 (2000) 27, 28, 34, 46

State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc,
111 Mich App 16; 314 NW 2d 512 (1981), *lv den* 414 Mich 951 (1982) 41, 42

Tesmer v Granholm,
114 F Supp 2d 603 (ED Mich, 2000) ..... xiii, 7

Tesmer v Kowalski (*reh en banc*),
333 F 3d 683 (6th Cir, 2003) ..... xiii, 8

Tesmer v Kowalski,
114 F Supp 2d 622 (ED Mich, 2000) ..... xiii, 7

Tesmer v Kowalski,
295 F 3d 536 (6th Cir, 2002) ..... xiii, 8

Tesmer v Kowalski,
307 F 3d 459 (6th Cir, 2002) ..... xiii, 8

Tileston v Ullman,
318 US 44 (1943) 21, 25

Tollett v Henderson,
411 US 258 (1973) 31, 32

United States Department of Labor v Triplett,
494 US 715 (1990) 18, 19

United States v Ruiz,
536 US 622 (2002) 31

United States v SCRAP,
412 US 669 (1973) 25

Usery v Turner Elkhorn Mining Co.,
428 US 1 (1976) 17

Warth v Seldin,
422 US 490 (1975) ..... passim

Younger v Harris,
401 US 37 (1971) 1, 12, 26

Statutes

28 USC § 1254(1) xiii

28 USC § 1331 1

28 USC § 1343(a)(3) 1

28 USC § 1343(a)(4) 1

28 USC § 2254(d) 44, 45, 46

30 USC § 901 *et seq* (1982 ed and Supp. V), The Black Lung Benefits Act of 1972, 83 Stat. 792, as amended 18

42 USC § 1983 ..... 1, 22

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996) 44

MCL 257.625 5

MCL 600.601 2

MCL 600.6419 2

MCL 600.8301 2

MCL 600.8311 2

MCL 750.110a 5

MCL 750.91 5

MCL 769.11 5

MCL 770.3(1)(d) 2

MCL 770.3(6) 2

MCL 770.3a ..... passim

MCL 770.3a(1) 4

MCL 770.3a(2) 4, 34

MCL 770.3a(3) 4, 34

MCL 770.3a(4) xvi

MCL 777.1 *et seq* xiv

Constitutional Provisions

Mich Const 1963, art I, § 20 ..... i, 2, 3

Mich Const 1963, art VI, § 13 2

US Const, Amend I 15

US Const, Amend VI 27

US Const, Amend XIV 28

US Const, Art III 9, 14

US Const, Art III, § 2 13

Regulations

20 CFR § 725.366(a) and (b) (1989) 18

Rules

MCR 2.119 36

MCR 2.119(A) 36

MCR 6.001(D) 36

MCR 6.005(H)(2)-(3) 35

MCR 6.301(C)(2) 34

MCR 6.302 ..... xvi, 31

MCR 6.302(B)(5), (6) ..... xvi, 32

MCR 6.433 36

MCR 7.203(A) 2

MCR 7.203(B) 2, 38

MCR 7.205 2

MCR 7.215 43

MCR 7.215(B) 43

MCR 7.215(C)..... 43

MCR 7.215(E)(1)..... 43

MCR 7.301..... 2

Other Authorities

Michigan Court of Appeals, "Preliminary Report And Recommendations Of The Delay Reduction Work Group," p. 22, Graphs 5, 6, 7 (March 1 2002)..... 39

Michigan Supreme Court 2001 Annual Report, Circuit Court Statistical Supplement, p. 1 (March 2002)..... 30

Michigan Supreme Court Annual Report 2001 Judicial Activity And Caseload, p. 14. (March 2002)..... 39

Sourcebook of Criminal Justice Statistics 2002, Table 5.44 and 5.46 "Felony convictions in State Courts," (adapted from U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2000, Bulletin NCJ 198821 (Washington, DC: U.S. Department of Justice, June 2003), p. 2, Table 1; p. 8, Table 9; p. 9, Table 10)..... 30

U.S. Department of Justice, Office of Justice Programs Bulletin NCJ 189737: "Federal Justice Statistics: Reconciled Data, Federal Criminal Case Processing, 2000, With trends 1982-2000," (Washington, DC: U.S. Dep't of Justice, November 2001), p. 11, Table 5..... 30

OPINIONS AND ORDERS BELOW

The opinion and order District Court for the Eastern District of Michigan on the issues of standing and the constitutionality of the statute is reported at *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). Pet. App. 87a. A subsequent opinion and order granting an injunction and denying class certification is reported at *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). Pet. App. 125a.

The panel decision of the United States Court of Appeals for the Sixth Circuit is reported at *Tesmer v Kowalski*, 295 F 3d 536 (6th Cir, 2002). Pet. App. 63a. The order granting rehearing *en banc* and vacating the panel decision is reported at *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). Pet. App. 85a.

The en banc decision of the Court of Appeals is reported at *Tesmer v Kowalski* (*reh en banc*), 333 F 3d 683 (6th Cir, 2003). Pet. App. 1a.

JURISDICTION

The Court of Appeals *en banc* judgment on rehearing was entered June 17, 2003. No rehearing was sought from that judgment. This Court's jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED

The pertinent federal and Michigan constitutional provisions, statutes, and court rules involved are reproduced in the Appendix to the Petitior Pet. App. 137a.[1]

The challenged statute, MCL 770.3a, (Pet. App. 139a) provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.[2]
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

[1] Current versions of the Michigan Court Rules can be found on the Michigan Courts Web site. See, http://courtofappeals.mijud.net/rules/public/default.asp.

[2] Sentencing guidelines are governed by statute, MCL 777.1 *et seq*. The Michigan Supreme Court has promulgated a Michigan Sentencing Guidelines Manual that can be found on the Michigan Courts Web site. http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm.

> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:

> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and

that the defendant may complete and file as an application for leave to appeal.[3]

Michigan Court Rule (MCR) MCR 6.302(B)(5), (6).[4] (Pet. App. 146a):

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

* * *

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;
(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and
(a) the defendant's sentence exceeds the guidelines,

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[3] The form is reproduced at Pet. App. 160a and can be found on the State Court Administrative Office (SCAO) Web site. See, http://courts.michigan.gov/cao/courtforms/appeals/cc405.pdf.

[4] It should be noted that that in an order entered February 3, 2004, (ADM File No. 2003-04) the Michigan Supreme Court, in response to a Report issued by the Committee on the Rules of Criminal Procedure, published for comment proposed amendments to several court rules, including MCR 6.302. The Staff comment, which is not an authoritative construction by the Court, notes that the proposed amendment to MCR 6.302 would conflict with MCL 770.3a(4) concerning the language advising a defendant of the right to appointed counsel on appeal. The public comment period expires May 1, 2004. The proposed amendments can be found at: http://courts.michigan.gov/supremecourt/Resources/ Administrative/2003-04-2-3-04.pdf

(b) the plea is a conditional plea under MCR 6.301(C)(2),
(c) the prosecuting attorney seeks leave to appeal, or
(d) the Court of Appeals or the Supreme Court grants leave to appeal.

STATEMENT OF THE CASE

The Michigan Constitution provides that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Mich Const 1963, art I, § 20. (Pet. App. 138a). The Michigan statute challenged in this litigation, MCL 770.3a (Pet. App. 139a), provides, with significant listed exceptions, that criminal defendants who plead guilty, guilty but mentally ill, or nolo contendere shall not have appointed appellate counsel for these discretionary appeals of the convictions or sentences.[5] In addressing a challenge brought by attorneys and indigent criminal defendants to the State's refusal to appoint appellate counsel, a deeply divided United States Court of Appeals for the Sixth Circuit issued two rulings en banc that are now before this Court.

Respondents asserted that the practice of denying appointed appellate counsel to guilty-pleading defendants in discretionary first appeals violates their right to equal protection and due process under the United States Constitution and that MCL 770.3a will continue to violate their rights.[6] The Court of Appeals held that the Respondent Attorneys, whose only personal stake in the case is the speculative loss of potential future income, have third-party standing to assert constitutional claims on behalf of unknown potential future indigent criminal defendants. The Court reached this conclusion notwithstanding its separate, unanimous conclusion that the District Court should have abstained, under the doctrine embodied in *Younger v Harris*, 401 US 37 (1971), from hearing the claims of the indigent criminal defendants themselves. The Court of Appeals then held on the merits that Michigan's denial of

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[5] MCL 770.3a applies to appeals from convictions based on pleas of guilty, guilty but mentally ill, and nolo contendere. For convenience, this Brief uses the term "guilty plea" to apply to all three types of convictions.

[6] The basis of jurisdiction of this 42 USC § 1983 lawsuit in the District Court was 28 USC §§ 1331, 1343(a)(3), and 1343(a)(4).

appointed counsel violates the Due Process Clause. Both of these rulings are wrong as matters of law.

A. The Michigan Framework For Appeals From Guilty Pleas.

Michigan has a two-tier appellate court system consisting of the intermediate Court of Appeals and the Michigan Supreme Court. The Michigan Court of Appeals has jurisdiction of appeals of right from most final judgments or final orders of the circuit courts or the Court of Claims.[7] MCR 7.203(A); Pet. App. 151a. Other appeals, including criminal cases in which the conviction is based on a plea of guilty, are discretionary, by leave granted. Mich Const 1963, art 1, § 20; MCL 600.308(2)(d), 770.3(1)(d); MCR 7.203(B); Pet. App. 138a, 139a, 151a. All appeals to the Michigan Supreme Court are discretionary, by leave granted. MCL 770.3(6); MCR 7.301; Pet. App. 139a, 158a.

The requirements for filing an application for leave to appeal to the Michigan Court of Appeals are set forth in the court rules. MCR 7.205. Pet. App. 152a. That Court may grant or deny the application; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed.

Before 1994, Mich Const 1963, art 1, § 20, provided defendants an appeal of right from all criminal convictions and,

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[7] The circuit courts are the trial courts of general jurisdiction, including jurisdiction over felonies and appellate jurisdiction over lower courts. Mich Const 1963, art VI, § 13; MCL 600.601. The district courts have jurisdiction over misdemeanors, MCL 600.8311, and exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00. MCL 600.8301. The Court of Claims is a special court established to hear claims against the State. MCL 600.6419.

"as provided by law, when the trial court so orders, . . . such reasonable assistance as may be necessary to perfect and prosecute an appeal." Case law provided that defendants could appeal by right from plea-based convictions and therefore there was a right to appointment of appellate counsel. In 1994, a proposal to amend the constitution was adopted by the people that made appeals from plea-based convictions discretionary. As amended, Const 1963, art 1, § 20 now states that an accused is entitled "to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . ."

The Michigan Supreme Court has described in detail the history of the framework for appeals from guilty pleas in Michigan. *People v Bulger*, 462 Mich 495, 503-506; 614 NW2d 103 (2000) *cert denied,* 531 US 994 (2000)(holding that neither the Michigan Constitution nor the United States Constitution requires the appointment of appellate counsel at public expense when a criminal defendant applies for leave to appeal a plea-based conviction). The Court also described the reasons for the constitutional amendment, 462 Mich at 504:

> Eliminating appeals as a matter of right from plea-based convictions was suggested as a way to help control the case load of the Michigan Court of Appeals. By 1992, the Court of Appeals had a backlog of more than 4,000 cases awaiting decision, and plea-based appeals constituted approximately thirty percent of all appeals facing the Michigan Court of Appeals. Eliminating appeals of right from plea-based convictions was one method proposed to reduce a crushing burden on our appellate courts. [Citations and internal quotation marks omitted.]

The challenged statute, MCL 770.3a, became effective April 1, 2000.[8] It provides that "a defendant who pleads guilty . . . shall not have appellate counsel appointed for review of the defendant's conviction or sentence." MCL 770.3a(1). Four exceptions specify that appellate counsel must be appointed when the prosecution seeks leave to appeal; when the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines; when the appellate court grants the defendant's application for leave; and when the defendant seeks leave to appeal a conditional plea. MCL 770.3a(2). Additionally, appellate counsel may be appointed in one other circumstance when three factors are present: the defendant seeks leave to appeal a sentence based upon allegedly improper scoring of offense or prior record variables; the defendant preserved an objection to the scoring; and the sentence constitutes an upward departure from the upper limit of the minimum sentence range. MCL 770.3a(3).[9]

B. The Present Lawsuit

A month before the statute's effective date, this lawsuit was filed by Respondents, who are three indigent criminal defendants and two criminal defense attorneys. The named defendants (current Petitioners) were three State Circuit Court Judges and the then Attorney General of Michigan, who was later dismissed by the District Court and is no longer a party.[10]

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[8] Because MCL 770.3a did not apply to the defendant in *Bulger*, the precise question of its constitutionality was not before the Michigan Supreme Court, but the Court explicitly upheld the constitutionality of the practice of denying appointed counsel.

[9] Assigned appellate counsel are paid by counties, not the State. *Frederick v Presque Isle County Circuit Judge*, 439 Mich 1; 476 NW 2d 142 (1991).

[10] Petitioner John F. Kowalski is a Judge of the 26th Judicial Circuit (Alcona, Alpena, and Montmorency Counties); Petitioners William A. Crane and Lynda L. Heathscott are Judges of the 10th Judicial Circuit (Saginaw County).

Respondent Tesmer is an indigent who pleaded guilty in 1999 to a charge of home invasion, MCL 750.110a, and was sentenced by Petitioner Kowalski to a term of 9 to 15 years imprisonment. Petitioner Kowalski denied Tesmer's request for appointed appellate counsel on September 7, 1999, before MCL 770.3a took effect. Tesmer appealed to the Michigan Court of Appeals and raised the issue of the denial of counsel, and his appeal was pending when the District Court complaint was filed. The Michigan Court of Appeals denied his delayed application for leave to appeal on March 28, 2001. He did not seek appeal to the Michigan Supreme Court.

Respondent Carter is an indigent who pleaded guilty in 1999 to a charge of attempted murder, MCL 750.91, and was sentenced by Petitioner Crane to a term of life imprisonment. Petitioner Crane denied Carter's request for appointed appellate counsel on May 12, 1999, before MCL 770.3a took effect. Carter did not appeal, although a delayed application would still have been timely when the District Court complaint was filed.

Respondent Schnell is an indigent who pleaded guilty in 1998 to a charge of operating a vehicle under the influence of liquor, third offense, MCL 257.625, 769.11, and was sentenced by Petitioner Heathscott to a term of 5 to 10 years imprisonment. Petitioner Heathscott denied Schnell's request for appointed appellate counsel on September 21, 1998, before MCL 770.3a took effect. Schnell appealed to the Michigan Court of Appeals, which denied his application on April 1, 1999. Rehearing was denied on May 25, 1999, and Schnell did not appeal to the Michigan Supreme Court.

Respondent Attorneys Fitzgerald and Vogler alleged that they are on lists of attorneys qualified to take assignments as appointed appellate counsel and that each of them "earns a portion of his income as an attorney taking assigned appeals

from trial and plea based convictions."[11] They alleged that the practice of denying appointed appellate counsel to indigent defendants convicted by guilty pleas had adversely affected their incomes and that MCL 770.3a "will adversely affect" their incomes because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Complaint, paragraphs 33-36; Joint App. 16a. Neither of them represented any of the indigent criminal defendant Respondents. They asserted third-party standing under the doctrine of *jus tertii* to assert the constitutional rights of future indigent criminal defendants.

C. Proceedings Below

On March 31, 2000, the District Court entered an opinion and order declaring that both MCL 770.3a and the practice of

[11] The Brief In Opposition to the Petition, pp. 14-15, accurately describes the Michigan system for assigning appellate counsel:

> In 1978, the Michigan Legislature established an Appellate Defend[er] Commission. Mich. Comp. Laws §780.712. One of the functions of that Commission was to compile and maintain a statewide roster of attorneys eligible and willing to accept assigned criminal appeals. Mich. Comp. Laws §780.712(b) [*sic*, 780.712(6)]. Subsequently, by Administrative Order of the Michigan Supreme Court, the agency known as Michigan Assigned Appellate Counsel System (MAACS) was established to perform this function. Michigan Supreme Court Administrative Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. Administrative Order 1981-7, §2(1), 412 Mich. lxviii. After qualifying for the statewide list, the attorney selects the circuit courts he is willing to take appeals from by placing his name on a local list. Michigan circuit court judges appointing appellate counsel to an indigent defendant must appoint from this roster of approved lawyers. Moreover, in appointing appellate counsel in a particular case, the local circuit court or its designated representative rotates through the local list. Administrative Order 1989-3(4), (5), 432 Mich cxxii (1989).

denying appointed appellate counsel to indigent criminal defendants who have been convicted by guilty pleas unconstitutionally denied them equal protection and due process under the United States Constitution; declaring that Respondent Attorneys had third-party standing; abstaining from deciding Respondent Tesmer's claims, but not Respondent Carter's or Schnell's; and dismissing defendant Attorney General. The Court granted in part and denied in part Petitioners' motion to dismiss and denied Respondents' motion for a preliminary injunction. *Tesmer v Granholm*, 114 F Supp 2d 603 (ED Mich, 2000). Pet. App. 87a.

Respondents filed motions for class certification and for injunctive relief, contending that Petitioner Heathscott and Respondent Kolenda, a nonparty State Circuit Court Judge (17th Judicial Circuit, Kent County), were violating the District Court's opinion and order by refusing to appoint appellate counsel for non-party indigent criminal defendants who had been convicted by guilty pleas. On June 30, 2000, the District Court issued an opinion and order that enjoined Petitioner Heathscott and purported to bind Respondent Kolenda and all Michigan State Judges from denying appointed appellate counsel. The District Court declined to certify either a plaintiff or a defendant class. *Tesmer v Kowalski*, 114 F Supp 2d 622 (ED Mich, 2000). Pet. App. 125a.

Petitioner Judges appealed from the June 30, 2000 opinion and order. Respondent Kolenda filed a separate appeal. On July 2, 2002, a panel of the Court of Appeals entered a decision concluding that the District Court should have abstained from deciding the claims of all three Respondent criminal defendants; that the Respondent Attorneys had third-party standing; and that MCL 770.3a sufficiently protects an indigent defendant's constitutional rights. The Court dissolved the injunction issued by the District Court, reversed and vacated the grant of declaratory relief, and remanded the matter with instructions to enter judgment in favor of Petitioners. *Tesmer v*

Kowalski, 295 F 3d 536 (6th Cir, 2002). Pet. App. 63a. Respondents filed a motion for rehearing *en banc* that was granted on September 20, 2002, which had the effect of vacating the panel decision. *Tesmer v Kowalski*, 307 F 3d 459 (6th Cir, 2002). Pet. App. 85a.

On *en banc* rehearing, 333 F 3d 683; Pet App. 1a, the Court of Appeals entered a 7-5 decision on June 17, 2003, affirming the District Court in part and reversing in part. The Court unanimously held that abstention applies to all three indigent criminal defendants. Pet. App. 6a-10a. The majority then recognized the general principle that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," quoting from *Warth v Seldin,* 422 US 490, 499 (1976). The majority concluded, however, that the Respondent Attorneys fell within an exception to that principle articulated in *Powers v Ohio,* 499 US 400, 410-411 (1991) that permits "a litigant to bring suit on behalf of a third party if 1) the litigant has stated an injury in fact, 2) the litigant has a close relation to the third party, and 3) the third party's ability to assert his own interests is hindered." Pet. App 10a-19a. On the merits of the constitutionality of the statute, the majority held that the statute "creates unequal access" and "a different opportunity for access to the appellate system based upon indigency," and therefore violates due process. Pet. App. 19a-29a. Finally, the majority reversed the District Court's injunction in part, holding that it was improper with respect to Judge Kolenda and all non-party Michigan State Judges. Pet. App. 29a-35a.

In separate opinions, four Judges dissented from the holding that the attorneys had third-party standing, Pet. App. 35a-50a, and a slightly different group of four Judges dissented on the merits of the constitutional issue, concluding that "the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system." Pet. App. 50a-60a.

SUMMARY OF ARGUMENT

1. The Court of Appeals should have declined to adjudicate the claims of the Respondent Attorneys, because they have no standing to litigate the rights of potential future clients. Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v Seldin*, 422 US 490, 498 (1975). Under the constitutional limitation Respondent Attorneys must establish a "case or controversy" within the meaning of US Const, Art III. This requires the existence of "an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992). The Respondent Attorneys do not allege violation of their own constitutional rights; they only assert potential loss of future income from potential future clients. This allegation does not establish an "injury in fact" giving them standing to litigate the question of whether a future guilty-pleading defendant has a constitutional right to appointed appellate counsel.

The error of the Court of Appeals' conclusion that the Respondent Attorneys have standing is highlighted by the Court's determination regarding the claims of the indigent criminal defendants themselves. They asserted that they have a constitutional right to appointed appellate counsel in their appeals from their guilty plea convictions, but the Court of Appeals correctly held that the federal courts should abstain from adjudicating their claims because they had an adequate opportunity to litigate them in the Michigan courts.

The general rule of standing is that a plaintiff must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. The Court of Appeals, however, has turned this general rule on its head by denying a federal forum to those whose interests have allegedly

been harmed while allowing third parties to assert those very claims in federal court. While this Court has permitted litigants to bring actions on behalf of third parties, it has only done so when three important criteria are satisfied: The litigant must have suffered an "injury in fact"; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Powers v Ohio*, 499 US 400, 410-411 (1991). None of those criteria is present in this case. The Respondent Attorneys have not demonstrated an "injury in fact" because they have no legally protected interest in potential fees from possible future appointments for unknown clients. They do not have a sufficiently "close relationship" with such potential future clients. And any such future clients will not be hindered from bringing their own claims in any future prosecutions and appeals. Expanding the concept of standing to permit these Attorneys to raise these claims raises the specter of giving unfettered authority to attorneys to litigate all manner of claims in the absence of actual clients whose interests might be at stake, even when those clients have adequate opportunity to litigate for themselves.

2. There is no constitutional right to appeal a criminal conviction, but if a State provides an appeal of right on the merits, it generally must provide appointed counsel for indigents. After a first appeal of right, however, appointed counsel is not required for a subsequent discretionary appeal, because of the different nature of discretionary review and because indigents can adequately present their claims themselves. Michigan provides that appeals following guilty plea convictions are discretionary, not by right, and, with significant specified exceptions, counsel is not appointed to indigents in such discretionary appeals. The difference Michigan recognizes between appeals from guilty plea convictions and appeals from convictions after trials is based on reasoned distinctions inherent in guilty plea convictions. Because of procedures used during guilty pleas and in the

appellate system, indigent appellants have an adequate opportunity to present their claims fairly.

Unlike appeals of right on the merits, appeals to the Michigan Court of Appeals from guilty plea convictions are discretionary and are not on the merits. Even without an attorney, an indigent appellant will have a transcript; any motions and briefs filed by a lawyer in the trial court that identify legal issues and outline the applicable law; and the trial court's opinion regarding motions, either in writing or in a transcript of an oral opinion. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office, permit appellants without counsel to present their claims in a "lawyerlike fashion." Taken as a whole, the Michigan system of appeals from guilty plea convictions provides adequate and effective appellate review to indigent criminal defendants.

ARGUMENT

I. Attorneys Whose Only Personal Stake Is The Speculative Loss Of Potential Future Income Do Not Have Third-Party Standing To Allege Violation Of The Constitutional Rights Of Potential Future Clients

The Court of Appeals should not even have reached the issue of the constitutionality of MCL 770.3a because none of the Respondents is a proper party to bring the challenge. Relying on *Younger v Harris*, 401 US 37 (1971), the Court of Appeals correctly concluded that "the district court should have abstained from hearing the claims of all three indigent plaintiffs" because ongoing proceedings in Michigan State courts gave the indigent Respondents adequate opportunity to bring their constitutional claims. Pet. App. 6a-10a. Despite the fact that the indigent Respondents themselves were barred from bringing their claims in federal court, and despite the fact that the Respondent Attorneys did not represent any of the indigent Respondents, the Court of Appeals nevertheless erroneously concluded that the Respondent Attorneys had third-party standing to assert the rights of potential future indigent criminal defendants. Pet. App. 10a-19a.

Four Judges dissented, aptly noting the incongruity of permitting attorneys to argue in federal court on behalf of State-court defendants when the federal courts properly abstained from entertaining the claims of the defendants themselves, Pet. App. 35a:

> Permitting lawyers in their own right to raise the same claims that *Younger* teaches cannot be brought by their clients undermines the very deference to state court processes required by *Younger*. Time-honored prudential rules against third-party standing do not generally permit lawyers as parties to litigate the interests of their clients, and exceptions to the third-party standing rule should not be expanded to provide a tool to circumvent the policies underlying *Younger*.

This Court has consistently held that "[w]hen a person or entity seeks standing to advance the constitutional right of others" the person or entity must make two showings: first, that "the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, [that] prudential considerations . . . point to permitting the litigant to advance the claim." *Caplan & Drysdale, Chartered v United States*, 491 US 617, 623-24 n3 (1989) (citing *Singleton v Wulff*, 428 US 106, 112 (1976)). The Respondent Attorneys—who "seek[] standing to advance the constitutional right of" unknown potential indigent defendants who plead guilty—cannot make either showing.

A. To Have Third-Party Standing, (i) The Litigant Must Have Suffered An "Injury In Fact"; (ii) The Litigant Must Have A Close Relation To The Third Party; and (iii) There Must Exist Some Hindrance To The Third Party's Ability To Protect Its Own Interests

The jurisdiction of the federal courts is limited by US Const, Art III, § 2, to "Cases" or "Controversies." In *Lujan v Defenders of Wildlife*, 504 US 555, 560 (1992) this Court described standing as the "core component" and "an essential and unchanging part of the case-or-controversy requirement of Article III," and identified the three elements that make up the "irreducible constitutional minimum" of standing that the party invoking federal jurisdiction must establish: an "injury in fact"; a causal connection between the injury and the conduct complained of; and likelihood that the injury will be redressed by a favorable decision. The "injury in fact" must be "an invasion of a legally protected interest" that is (a) "concrete and particularized," meaning that it "must affect the plaintiff in

a personal and individual way," and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Id.*, at 560, and n.1. (Citations omitted.)

In addition to the constitutional limitations on standing, this Court has noted a prudential limitation on the exercise of judicial power with respect to claims of third-party standing, *Warth v Seldin*, 422 US 490, 499 (1975): "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." In *Powers v Ohio*, 499 US 400, 410-411 (1991), the Court described the limited circumstances in which the general prohibition against permitting a litigant to raise claims of third parties can be overcome: "The litigant must have suffered an 'injury in fact,' . . . ; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." (Citations omitted.)

The Respondent Attorneys have not suffered any "injury in fact" sufficient to establish a constitutional case or controversy, and as a prudential matter, they have no close relation to third parties who might be injured by operation of the Michigan statute; and any such third parties are not hindered from protecting their own interests.

1. Respondent Attorneys Have Not Suffered An "Injury In Fact."

In their complaint the Respondent Attorneys do not allege any violation of their own rights. Instead they only assert that the statute will cause an adverse impact on their income, and they claim third-party standing to assert the constitutional rights of unknown potential indigent criminal defendants. Complaint, paragraphs 33-37; Joint App. 16a. These claims of the Respondent Attorneys are neither sufficient to establish a "case or controversy" under US Const, Art III, § 2 to assert

their own rights, nor sufficient to permit the Attorneys to assert the rights of others. [12]

In *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624 n.3 (1989), the Court emphasized that even when a litigant seeks to advance the constitutional rights of others, the "injury in fact" must be "adequate to satisfy Article III's case-or-controversy requirement." The burden of demonstrating standing is on the party invoking federal jurisdiction, *Lujan, supra*, 504 US at 561, and that burden is "'substantially more difficult' to establish" when, as here, "the plaintiff is not himself the object of the government action or inaction he challenges," but instead the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Id.*, at 562 (emphasis in original, citations omitted). The "injury in fact" test requires more than an injury to a cognizable interest of someone; "It requires that the party seeking review be himself among the injured." *Id.*, at 563, quoting *Sierra Club v Morton*, 405 US 727, 734-735 (1972).

Because the standing issue was raised in a motion to dismiss, the Attorneys' assertion that the statute will adversely affect their incomes must be taken as true, *Warth v Seldin*, 422 US at 501. Even so, their claims are speculative and uncertain since they merely allege an indirect potential consequence of the statute. The Court of Appeals concluded that the Respondent Attorneys had suffered an injury in fact because they "stand to lose income if the challenged statute remains if force." Pet. App. 12a. These claims, however, are not sufficient to allege "'such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-

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[12] This case does not involve any First Amendment claims, US Const, Amend I, that might trigger application of the "overbreadth" doctrine, where one as to whom a statute is constitutional may be permitted to challenge its constitutionality as to others. See, *Broadrick v Oklahoma*, 413 US 601 (1973.

court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth*, 422 US at 498-499, quoting *Baker v Carr*, 369 US 186, 204 (1962).

Respondent Attorneys' claim is simply that they are on rosters of attorneys who on occasion receive court appointments to represent criminal appellants and that the challenged statute "will reduce the number of cases in which they could be appointed and paid." Complaint, paragraphs 33-36; Joint App. 16a. They did not plead guilty to a criminal charge. They did not request the appointment of appellate counsel. They were not denied the appointment of appellate counsel. They do not allege that they have any contractual or other right to any particular appointment or any specific number of appointments. They do not allege any violation of any "personal right under the constitution," *Warth*, 422 US at 509. They cannot do so because attorneys have no constitutional or contractual right to receive court appointments to represent indigents on appeal.

Perhaps the failure to appoint appellate attorneys for criminal defendants who plead guilty will result in some loss of economic benefit Respondent Attorneys might otherwise have received. Mere potential economic injury is not enough to confer standing however; as noted above, there must be an injury to a legally protected interest. *Lujan, supra*, 504 US at 560. The fact that a new rule of law might have an adverse economic effect does not mean that those who benefited from the previous law have a legally protected interest in maintaining it. "No person has a vested interest in any rule of law entitling him insist that it shall remain unchanged for his benefit." *New York Central R.R. Co v White*, 243 US 188, 198 (1917)(holding that a State workers' compensation statutory system did not violate constitutional rights of an employer). The Constitution does not forbid the creation of new rights or the abolition of old ones, even if settled expectations might be upset. *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 15-16

(1976)(federal statute requiring coal mine operators to provide medical benefits for former employees who terminated work before the act's passage, held not to violate the Due Process Clause). The Respondent Attorneys have suffered no "injury in fact" that is "concrete," "personal and individual," and "actual or imminent, not conjectural or hypothetical." *Lujan, supra*, 504 US at 560 (footnote and internal quotation marks omitted). They have no standing.

2. Respondent Attorneys Do Not Have A Sufficiently Close Relation To Unknown Potential Indigent Defendants Who Might Be Injured By Operation Of The Michigan Statute

The Court of Appeals held that "the relationship between indigent defendants who seek appointed appellate counsel and attorneys whose appellate representation is denied is a close one." Pet App. 12a. That determination disregards the fact that the Court correctly abstained from adjudicating the rights of the indigent criminal defendant Respondents who were before the Court, and it disregards the fact that the Respondent Attorneys have no present clients whose rights are at issue. The Respondent Attorneys do not have a sufficiently "close relation" to unknown future potential clients and, as a prudential matter, the federal courts should not have recognized third party standing.

Generally attorneys do not have standing to assert the rights of their clients. *Conn v Gabbert*, 526 US 286 (1999)(attorney who was prevented by prosecutor from being with client held not to have standing to assert a constitutional right of his client to have counsel available during a grand jury proceeding). In two cases, however, this Court recognized limited circumstances where attorneys had third-party standing. Both are distinguishable from the present case.

In *Caplin & Drysdale, supra*, 491 US 617, a law firm was given third-party standing to challenge a drug forfeiture statute on behalf of its existing client. The client's assets were subject to a restraining order preventing their transfer, but the client nevertheless transferred $25,000 to the law firm and later entered a guilty plea in which he forfeited the remaining assets. The law firm filed a petition asking the court to declare that the $25,000 and an additional $170,000 were either exempt from forfeiture as attorney fees or that the statute's failure to provide an exemption rendered it unconstitutional. This Court said that the law firm's stake in the forfeited assets "is adequate injury-in-fact to meet the constitutional minimum of Article III standing." 491 US at 624 n. 3. The Court permitted the law firm to advance its client's constitutional rights, in part because it said that the attorney-client relationship "is one of special consequence."[13] *Id.* Here, however, there is no established attorney-client relationship. At most, Respondent Attorneys have some expectation that an attorney-client relationship will be created some time in the future with some unknown criminal defendant who might plead guilty and then desire appointed appellate counsel. Such speculation does not rise to the level of "special consequence."

In *United States Department of Labor v Triplett*, 494 US 715, 720 (1990) an attorney was permitted to litigate on behalf of existing clients. A federal statute and regulations[14] permitted successful litigants to received reasonable attorney fees from

[13] The Court based this conclusion on an analogy to "the doctor-patient relationship in [*Eisenstadt v Baird*, 405 US 438, 443-446 (1972)]," a habeas corpus case. But in *Baird* the respondent merely lectured in his capacity as "an advocate of the rights of persons to obtain contraceptives," 405 US at 445, and then distributed prohibited contraceptives. He was neither a physician nor a pharmacist exempted from prosecution under the challenged statute. See *Baird v Eisenstadt*, 429 F 2d 1398, 1399 n. 1 (1st Cir 1970).

[14] The Black Lung Benefits Act of 1972, 83 Stat. 792, as amended, 30 USC § 901 *et seq*. (1982 ed. and Supp. V); and 20 CFR § 725.366(a) and (b) (1989).

the agency, if approved by the tribunal. The attorney violated these restrictions by receiving unapproved attorney fees under contracts with his clients, and the West Virginia State Bar Legal Ethics Committee imposed discipline against him. He defended by asserting the constitutional due process rights of his clients. The Court observed that a due process right to representation was placed at issue because at least one of the attorney's clients had property rights in previously awarded benefits that the government was seeking to recover as erroneously paid. 494 US at 720-721. The Court therefore concluded that the case fell within the principle that third-party standing can exist when "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement)." *Id.*, at 720. The facts of the present case do not bring it within that principle, however, because here the challenged statute is not enforced against Respondent Attorneys; there are no existing clients with constitutional entitlements; and there is nothing preventing the Attorneys from entering into relationships with other clients in the future, although the taxpayers will not pay for the attorneys fees in such a relationship.

Other cases in which the Court has found that litigants have third-party standing typically involve existing relationships with the third party or other special circumstances. In *Griswold v Connecticut*, 381 US 479, 481 (1965), for example, the court found that two physicians convicted as accessories of violating a criminal statute against the use of contraceptive devices had "standing to raise the constitutional rights of the married people with whom they had a professional relationship." In *Eisenstadt v Baird, supra*, 405 US 438, 443-446, there was no professional relationship but an advocate was permitted to assert the rights of unmarried persons denied access to contraceptives. Critical to the determination of standing, however, were the facts that the advocate had been

convicted of violating the criminal statute at issue, and that "unmarried persons denied access to contraceptives in Massachusetts . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." *Id.*, at 446. The Court also analogized to the specialized area of "First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Id.*, at 445, n.5.

Similarly in *Barrows v Jackson*, 346 US 249, 256-257 (1953) the Court permitted a Caucasian who was sued for money damages to enforce a racially restrictive real estate covenant to assert the constitutional rights of non-Caucasians who were not before the Court. The threat of money damages against the litigant established the existence of a "case or controversy" and the Court noted that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."

Respondent Attorneys have cited two cases, *Craig v Boren*, 429 US 190, 192-197 (1974) and *Carey v Population Services International*, 431 US 678, 682-684 (1977), where vendors were found to have third-party standing to assert claims of customers, but they, too, are distinguishable from the present case. In *Craig*, a vendor of 3.2% beer was found to have third-party standing to assert the constitutional claims of male customers between 19 and 21 years of age. There, however, the challenged statute operated directly against the vendor who was threatened with "sanctions and perhaps loss of license," 429 US 195, so the constitutional requirement was satisfied. The government never challenged the federal courts' prudential exercise of third-party standing, and because of mootness considerations, concern for judicial economy, and the fact that the statute prohibited only distribution and not use, the vendor was "the obvious claimant" to bring the action. 429 US at 197.

In *Carey*, which the Court said was "settled" by *Craig*, 431 US at 683, a vendor of contraceptive devices who was directly subject to legal sanctions for violating a statute prohibiting sales to minors under the age of 16, was permitted to assert the claim of its customers. In both *Craig* and *Carey*, unlike the present case, the litigant satisfied the constitutional requirement for standing since it was directly subject to the challenged statute, and as a prudential matter it was permitted "to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the litigant's] constitutional challenge fail." *Craig*, 429 US at 195, quoting *Griswold*, 381 US at 481.

In *Tileston v Ullman*, 318 US 44 (1943), on the other hand, a physician was held not to have standing to challenge a the statute that, if applicable to him, would prevent his giving professional advice concerning the use of contraceptives to his patients, who were not parties. The complaint alleged violations of his patients' rights, but no violation of his own rights. This Court in *Eisenstadt v Baird*, 405 US at 443, n. 4, distinguished *Tileston* as a situation where "[t]he patients were fully able to bring their own action." The present case more closely resembles *Tileston* than *Eisenstadt*.

3. Future Indigent Criminal Defendants Are Not Hindered From Protecting Their Own Interests.

Finally, in the present case there is no "hindrance to the [unknown potential indigent criminal defendants'] ability to protect [their] own interests." *Powers, supra*, 499 US at 411. The Court of Appeals' erroneous conclusion that indigent criminal defendants face "significant obstacles of indigency and procedural processes" is based on circular, self-fulfilling reasoning and on that Court's belief that indigent criminal defendants would not succeed in their own challenges. Pet. App. 12a-19a.

The Court of Appeals' statements that "almost every layperson would need the help of counsel to present an appeal" and "an indigent would have difficulty pursuing the right counsel as a *pro se* plaintiff" (Pet. App. 13a) show that the Court was prejudging the merits of the issue of entitlement to appointed counsel instead of properly determining standing. This Court cautioned against just such bootstrapping in *Warth*, 422 US at 500 ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"). Ironically, although the Court of Appeals used this improper analysis in deciding the third-party standing issue, it correctly disavowed the same analysis when deciding whether to abstain from the indigent criminal defendants' claims, Pet. App. 9a: "Whether [Respondent Carter] had the legal sophistication to succeed in his application for leave to appeal or needed counsel to assist does not address the abstention issues, but instead addresses the merits of the constitutional claim."

Like the named indigent Respondents, future indigent criminal defendants can challenge the denial of appointed appellate counsel in direct appeals in the Michigan courts, in petitions for certiorari to this court (in which this Court has held that appointed counsel is not required by the Constitution, *Ross v Moffitt, supra*, 417 US at 616-618), and in petitions for writs of habeas corpus in federal court.[15] Even if the Court of Appeals is correct that an indigent defendant would be unlikely to prevail in a direct appeal in the Michigan courts, in a 42 USC § 1983 lawsuit, or in a federal habeas corpus lawsuit, that fact has no bearing on the issue of whether there are barriers to presenting the claims.

The present case is unlike decisions where this Court has recognized circumstances impairing the third parties' ability to protect their own rights. For example, in *Caplin & Drysdale,*

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[15] Such habeas corpus cases are already pending, see *Bulger v Curtis,* USDC, ED Mich No. 00-CV-10476-BC and *Ridley v Grayson*, USDC, ED Mich No. 00-CV-73580-DT.

supra, 491 US at 624 n.3, the statute materially impaired an existing client's ability to exercise his constitutional rights. The fact that the forfeiture of the funds was a condition of the plea bargain meant that the defendant had no incentive to challenge the forfeiture since he would lose the money either to the government or to his attorney, and a successful challenge would cast doubt on the validity of the entire bargain of the plea. Thus the attorney was in reality the only person with sufficient interest in challenging the forfeiture provision. Similarly in *Powers, supra*, 499 US at 414, the Court noted that the legal and practical "barriers to a suit by an excluded juror are daunting." In the present case none of these concerns is present. The very reason that it was appropriate for the federal courts to abstain from deciding the challenge brought by the indigent Respondents themselves is that they had adequate opportunity to bring their federal claims in the Michigan courts.

Physicians have been permitted to bring constitutional challenges on behalf of their patients seeking abortions where the physicians themselves were subject to criminal prosecution, *Doe v Bolton*, 410 US 179, 188-189 (1973)("The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment."). In *Warth v Seldin, supra*, 422 US at 510, the Court cited *Bolton* and two other cases for the proposition that "this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." Such decisions have no application to the present case, of course, because the Michigan statute applies only to indigent criminal defendants, not the Respondent Attorneys.

In *Singleton v Wulff*, 428 US 106, 112-113 (1976), the Court unanimously held that physicians challenging an abortion funding statute had sufficient personal stake in the controversy to give them standing to assert their own constitutional rights. Only four Justices, however, agreed that the physicians had standing to assert the constitutional rights of their patients, based on considerations of mootness and the chilling effect of publicity on the privacy of the abortion decision that limited the ability of the patients themselves to bring the challenge. *Id.*, at 113-118.[16] The Court of Appeals referred to that portion of the *Singleton* opinion as a "plurality" and relied on it to find standing. Pet. App 11a-12a. In any event, these considerations are not present here, because indigent convicted defendants do not have similar privacy or mootness concerns. *Caplin & Drysdale, supra*, 491 US at 624 ("a criminal defendant suffers none of the obstacles discussed in [*Singleton v*] *Wulff, supra*, at 116-117, to advancing his own constitutional claim.").

B. The Court Of Appeals' Misapplication Of This Court's Criteria For Third-Party Standing Fundamentally Expands The Doctrine

The Court of Appeals held that attorneys who might receive fees in the future have standing in federal court to assert the constitutional rights of unknown potential clients, even though those clients have an adequate State court forum to litigate their own claims. Neither the Court of Appeals nor the Respondents have cited any decisions of this Court granting third-party standing to a litigant that was not directly subject to the challenged statute and had no existing relationship to a third party that might have been directly subject to statute in

[16] Another Justice declined to join that part of the opinion (Stevens, J., concurring in part, 428 US at 121-122) and four Justices dissented (Powell, J., with whom Burger, C.J., and Stewart and Rehnquist, JJ., joined, concurring in part and dissenting in part, 428 US at 122-131).

the future, where there was no impairment of potential third party's ability to protect its own interests.

The present case is more akin to the situation in *Tileston v Ullman, supra*, 318 US 44, where physicians were held not to have standing to seek declaratory relief on behalf of their patients, and *Warth v Seldin, supra*, 422 US at 509-510. In *Warth*, taxpayers of one jurisdiction were held not entitled to challenge another jurisdiction's zoning ordinance because they were not subject to it and there was no relationship existing between them and others whose rights were allegedly violated. The taxpayers were not themselves subject to the challenged practices and did not assert "any personal right under the Constitution or any statute" to be free from action that "may have some incidental adverse effect" on them. *Id.*, at 509. Instead, like the Respondent Attorneys in the present case, they argued "that they are suffering economic injury consequent to" practices that "violate the constitutional and statutory rights of third parties." *Id.* Despite the conjectural nature of the asserted economic injury, the Court said that even assuming that the taxpayers could establish that the zoning practices harmed them, the complaint was properly dismissed. *Id.*

Reiterating that "pleadings must be something more than an ingenious academic exercise in the conceivable," *United States v SCRAP*, 412 US 669, 688 (1973), and that mere "incidental congruity of interest" is insufficient to permit third-party standing, this Court held that the claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth*, 422 US at 510, 509.

In the present case the Respondent Attorneys' claims are of the same character. They are not themselves subject to the statute, they do not assert any personal rights, and they assert only incidental economic injury consequent to violation of the rights of third parties (unknown potential clients). The

dissenting opinion below, Pet. App. 35a, correctly observed that the effect of the majority's decision is to "circumvent" and "undermine[] the very deference to state court processes required by *Younger* [*v Harris*, *supra*, 401 US 37]." The dissent also cogently noted, Pet. App. 45a-46a, that if the majority is correct that these Attorneys have third-party standing to assert the constitutional claims of unknown potential clients, it is difficult to perceive a principled reason to deny standing in other situations like workers' compensation, Social Security, and tort reform: "It would be a short step from the majority's grant of third-party standing in this case to a holding that lawyers generally have standing to bring in court the claims of future unascertained clients."

By permitting attorneys to assert the claims of potential future clients, the Court of Appeals has fundamentally expanded the doctrine of third-party standing beyond the limits previously recognized in this Court's jurisprudence. This is a case where the cautionary words of Justice Powell, writing for himself and three other Justices, concurring in part and dissenting in part in *Singleton v Wulff*, 428 US 106, 129 (1976), are particularly pertinent:

> It seems wholly inappropriate, as a matter of judicial self-governance, for a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services.

The Respondent Attorneys have not demonstrated an "injury in fact" sufficient to establish a "case or controversy" in the constitutional sense, and have not shown, as a prudential matter, that they are proper parties to raise the issues sought to be litigated

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Although there is no constitutional right to an appeal, *McKane v Durston*, 153 US 684 (1894), this Court has held that if a State grants a right to a first appeal on the merits, then it generally cannot deny appointed counsel to an indigent. *Douglas v California*, 372 US 353, 357 (1963)("where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor" (emphasis in original)).[17]

By contrast, this Court has also held that after an initial first appeal by right to an intermediate State court of appeals, the Constitution does not require appointment of appellate counsel for a subsequent discretionary appeal to a State supreme court. *Ross v Moffitt*, 417 US 600, 610, 612 (1974). A discretionary appeal from a guilty plea conviction, in all relevant respects, more closely resembles *Moffitt* than *Douglas*. Accordingly, MCL 770.3a is constitutional.

The Sixth Amendment right to counsel applies to criminal prosecutions, not appeals.[18] The right to an attorney on appeal

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[17] See, *Smith v Robbins*, 528 US 259, 278 (2000): "For although, under *Douglas*, indigents generally have a right to counsel on a first appeal as of right, it is equally true that this right does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal." (Footnote omitted.) (holding that States are free to adopt procedures for determining whether an indigent's direct appeal by right on the merits is frivolous, so long as the procedures adequately safeguard the right to counsel).

[18] US Const, Amend VI: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." See, *Evitts v Lucey*, 469 US 387, 408-409 (1985)("But the words 'prosecutions' and 'defense' plainly indicate that the Sixth Amendment right to counsel applies only to trial

has therefore been analyzed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not the Sixth Amendment.[19] *Ross v Moffitt, supra*, 417 US at 608-609 ("The precise rationale for the *Griffin*[*v Illinois*, 351 US 12 (1956)] and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."); *Smith v Robbins, supra*, 528 US at 276 ("But our case law reveals that, as a practical matter, the two clauses largely converge to require that a State's procedure "afford adequate and effective appellate review to indigent defendants," *Griffin*, 351 US at 20 (plurality opinion).").

In *Ross v Moffitt* this Court described the framework for analyzing whether an indigent criminal defendant has a constitutional right to appellate counsel, 417 US at 612, 616:

> The Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the State to equalize economic conditions. It does require that the state appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system.

level proceedings. . . . An appeal by a convicted criminal is an entirely different matter.") (Rehnquist, J., dissenting, citation omitted); *Smith v Robbins, supra*, 528 US at 292("Although the Sixth Amendment guarantees trial counsel to a felony defendant, the Constitution contains no similarly freestanding, unconditional right to counsel on appeal, there being no obligation to provide appellate review at all")(Souter, J., dissenting, citations omitted).

[19] US Const, Amend XIV: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. [Citations and internal quotation marks omitted.]

The Michigan appellate system makes a distinction between appeals from convictions based on trials, which are by right, and appeals from convictions based on guilty pleas, which are discretionary.[20] Because this distinction is based on legitimate and permissible differences between trials and guilty pleas, the Michigan appellate system is "free of unreasoned distinctions." Furthermore, because of protections built into the guilty plea system, indigent guilty-pleading defendants "have an adequate opportunity to present their claims fairly" and receive a meaningful appeal without appointed appellate counsel.

[20] Petitioner Judges use the word "discretionary" in this brief to describe appeals in which an appellate court has a choice whether to accept the appeal (initiated by an application for leave to appeal) and to differentiate them from appeals by right (initiated by a claim of appeal), which the appellate court must accept. Respondents dispute that a first appeal from a guilty plea in Michigan is "a 'discretionary' appeal in any sense of the word" since, they assert, it is "an appeal that the Michigan Court of Appeals actually decides on the merits." Brief in Opposition to Petition for Certiorari, p. 8. Petitioners deny the assertion that orders denying applications for leave to appeal are decisions on the merits of the issues presented. See *infra*, pp. 37-46.

A. There Are Reasoned Distinctions Between Appeals From Convictions After Trials And Appeals From Guilty Plea Convictions

Convictions by guilty pleas are advantageous to both defendants and the government, and are a major aspect of the criminal justice system. *Brady v United States*, 397 US 742, 752 (1970) (describing advantages and noting that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty"). Recently the percentage of convictions by guilty pleas has been approximately 95% for both state and federal courts.[21]

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[21] In 2001, there were 40,930 felony convictions in Michigan Circuit Courts (including jury verdicts, non-jury verdicts, and guilty pleas in the "Criminal Capital" and "Criminal Non Capital" categories). Of these, 38,196 (93.32%) were by guilty pleas. Michigan Supreme Court 2001 Annual Report, Circuit Court Statistical Supplement, p. 1 (March 2002). http://courts.michigan.gov/scao/resources/publications/statistics/circuit-caseload-2001-april-29-02.pdf

In 2000, of the estimated 924,700 State court felony convictions nationwide 879,200 (95%) were by guilty pleas. Sourcebook of Criminal Justice Statistics 2002, Tables 5.44 and 5.46. "Felony convictions in State Courts," (adapted from U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2000, Bulletin NCJ 198821 (Washington, DC: U.S. Department of Justice, June 2003), p. 2, Table 1; p. 8, Table 9; p. 9, Table 10). http://www.albany.edu/sourcebook/1995/pdf/t544.pdf; http://www.albany.edu/sourcebook/1995/pdf/t546.pdf.

In FY 1999-2000, of 68,156 Federal criminal convictions 64,939 (95.28%) were by pleas of guilty or nolo contendere. U.S. Department of Justice, Office of Justice Programs Bulletin NCJ 189737: "Federal Justice Statistics: Reconciled Data, Federal Criminal Case Processing, 2000, With trends 1982-2000," (Washington, DC: U.S. Dep't of Justice, November 2001), p. 11, Table 5: "Disposition of defendants in cases terminated in U.S. district courts, by offense, October 1, 1999 - September 30, 2000." http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp00.pdf.

In *Tollett v Henderson*, 411 US 258, 267 (1973) this Court discussed the *Brady* trilogy of guilty plea cases (*Brady*; *McMann v Richardson*, 397 US 759 (1970); and *Parker v North Carolina*, 397 US 790 (1970)), and recognized unique aspects of guilty pleas:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

In Michigan, extensive protections are in place to assure that guilty pleas are voluntary, intelligent, and accurate. MCR 6.302; Pet. App. 146a-149a. The purpose of these elaborate guilty plea procedures is to make sure the record reflects "'that the defendant was informed of such constitutional rights and incidents of a trial as reasonably to warrant the conclusion that he understood what a trial is and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and such rights and incidents.'" *People v Saffold*, 465 Mich 268, 271; 631 NW2d 320 (2001) quoting *In re Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (Mich 1975). In reversing a lower court determination that a guilty plea was not voluntary, this Court recently said: "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 US 622, 629 (2002) (emphasis in original).

The Michigan court rule specifically requires that the trial court "speak[] directly to the defendant," the prosecutor, and the defendant's attorney to assure that the defendant is fully informed and fully understands that by pleading guilty he is giving up many rights, specifically including the right to appeal and the right to appointed counsel on any discretionary appeal. MCR 6.302(B)(5), (6); Pet. App. 147a. See *Iowa v Tovar*, 541 US ___; 124 S Ct 1379; Slip Opinion p 2 (2004)(holding that the Sixth Amendment "is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.")

In *People v Bulger, supra*, 462 Mich at 517, which upheld the constitutionality of the practice of denying counsel in discretionary first appeals from guilty pleas, the Michigan Supreme Court quoted from *Tollett v Henderson*, noted the State's "fundamental interest in the finality of guilty pleas," *Hill v Lockhart*, 474 US 52, 58 (1985), and then listed many rights that a guilty-pleading defendant gives up:

> Plea proceedings are also shorter, simpler, and more routine than trials; the record most often consists of the "factual basis" for the plea that is provided to the trial court. In contrast with trials, less danger exists in plea cases that the record will be so unclear, or the errors so hidden, that the defendant's appeal will be reduced to a meaningless ritual. Also, a concession of guilt limits considerably the potential issues that can be raised on appeal. See 1A Gillespie, Michigan Criminal Law and Procedure (2d ed), § 16:30, pp 94-104 (discussing the effect of a plea on the availability of various appellate claims).[7] These are all reasoned distinctions that are relevant to determining whether Michigan provides "meaningful access" to the appellate courts.

[7] By pleading guilty or nolo contendere, a defendant waives the following issues: search and seizure claims, defective complaint and warrant claims, claims of error as to the preliminary examination (including sufficiency of the proofs to bind over), Fifth Amendment claims, nonjurisdictional evidentiary issues, challenges to operating a vehicle while under influence of alcohol predicate offenses, claims (including constitutional claims) relating to the defendant's factual guilt and the prosecution's ability to prove the case, claims of error in juvenile waiver proceedings, speedy trial claims (if the plea is unconditional), claims of violation of the statutory 180-day rule, claims of speedy trial under MCL 768.1; MSA 28.1024, claims of failure to timely file the habitual [offender] information, statute of limitations claims, unpreserved entrapment claims, double jeopardy claims that are unpreserved so that the necessary facts to support the claim are missing, and ineffective assistance of counsel claims in which the underlying issues are waived by a guilty plea. Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed), § 10:50, pp 10-15 to 10-17.

Michigan's prohibition against the appointment of appellate attorneys for indigent criminal defendants is not absolute and many issues not waived by the plea will fall within one of the exceptions. The statute provides that appellate counsel shall be appointed whenever the prosecutor initiates an appeal, whenever the defendant's application for leave to appeal is granted, whenever the trial court exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines, and whenever a defendant seeks leave to appeal a

conditional plea.[22] MCL 770.3a(2); Pet. App. 140a. The statute further provides that appellate counsel may be appointed for an appeal of a sentence based on an alleged improper scoring of an offense variable or a prior record variable, when an objection has preserved the issue and the trial court has departed from the upper limit of the minimum sentence range that the defendant alleges should have been scored. MCL 770.3a(3); Pet. App. 140a.

These distinctions between trials and guilty pleas are legitimate and permissible, and support Michigan's decision to treat the respective appeals differently. The Court of Appeals made little attempt to evaluate these distinctions, merely noting that guilty pleas are not "infallible." Pet. App. 27a. This is an improper basis on which to base a determination of unconstitutionality. *Smith v Robbins*, *supra*, 528 US at 277, fn 8 ("Of course, no procedure can eliminate all risk of error"). Instead of relying on the Michigan Supreme Court's statement of issues that are waived by a guilty plea, the Court of Appeals incorrectly relied upon the dissenting opinion in *Bulger* for the proposition that some "legally complex" issues can still be appealed. Pet. App. 27a. This too is not a sufficient basis to hold the statute unconstitutional. *Ross v Moffitt, supra*, 417 US at 616:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

[22] A conditional plea is allowed by MCR 6.301(C)(2) and preserves for appeal pretrial rulings specified by the defendant at the time of the plea.

B. Defendants Who Plead Guilty Have An Adequate Opportunity To Present Their Claims Fairly And Receive A Meaningful Appeal.

In reaching the conclusion that a defendant is not entitled to appointed counsel in a discretionary appeal to the State Supreme Court after an appeal of right to the State intermediate appellate court, this Court in *Ross v Moffitt, supra*, 417 US at 615, noted the nature of the materials the defendant would typically have available:

> At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

In discretionary first appeals from guilty plea convictions in Michigan, unless there has been an interlocutory appeal the defendant will not have an appellate brief written by a lawyer or an appellate opinion. However, the defendant will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal.

It is the responsibility of appointed trial counsel to file appropriate interlocutory appeals and to respond to any preconviction appeals by the prosecutor. MCR 6.005(H)(2)-(3); Pet. App. 144a. As noted by the Michigan Supreme Court in *Bulger*, 462 Mich at 518-519, Michigan law requires that to preserve an issue for appeal, the defendant must move to

withdraw the plea before the trial court, and trial counsel is required to file such motions: "Thus, our court rules require trial counsel to assist the defendant in organizing and presenting to the trial court any potential appellate issues that warrant preservation." Furthermore, it is the responsibility of trial counsel to file any appropriate postconviction motions. Unless made in open court during a hearing or trial, a motion filed in Michigan courts must be in writing, and if it raises an issue of law it must be accompanied by a brief. MCR 2.119(A)(1), (2).[23] An indigent criminal defendant is entitled to free copies of court documents, including transcripts. MCR 6.433. The District Court also noted that Respondents Tesmer and Schnell both had the benefit of a detailed 38-page "lawyerly" appellate brief--obviously prepared by an attorney and circulated to "many indigent defendants"--addressing the constitutionality of the practice of denying appointed appellate counsel. Pet. App. 105a.

Thus, an indigent criminal defendant who has entered a plea and wishes to appeal will not approach the Michigan Court of Appeals empty-handed. Similarly to the indigent appellant in *Ross v Moffitt, supra,* he will have a transcript; any motions and briefs filed by a lawyer in the trial court that

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[23] MCR 2.119(A)(1), (2) provides, in pertinent part:

(A) Form of Motions.

(1) An application to the court for an order in a pending action must be by motion. Unless made during a hearing or trial, a motion must

(a) be in writing,

(b) state with particularity the grounds and authority on which it is based,

(c) state the relief or order sought, and

(d) be signed by the party or attorney as provided in MCR 2.114.

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based.

MCR 2.119 is a civil rule, but it also applies in criminal proceedings. See MCR 6.001(D).

identify alleged legal issues and outline the applicable law; and any trial court opinion regarding that motion, either in writing or in a transcript of an oral opinion. These, together with the "nontechnical and easily understood" form produced by the State Court Administrative Office (Pet. App. 160a-170a) as required by the statute, permit appellants without counsel to present their claims in a "lawyerlike fashion" as contemplated by *Ross v Moffitt*, 417 US at 615.

Contrary to the express language of these court rules and the opinion of the Michigan Supreme Court, the Court of Appeals below erroneously relied on statements by Respondents and disparaged these requirements. Pet. App. 28a.

C. Orders Of The Michigan Court Of Appeals Denying Applications For Leave To Appeal Are Discretionary And Are Not Decisions On The Merits Of The Legal Issues.

Beginning at least with *Griffin v Illinois*, 351 US 12 (1956) (holding that when a transcript of trial court proceedings is necessary for full direct appellate court review of the merits, the Constitution requires a State to provide the transcript to an indigent), and continuing through *Douglas v California, supra*, 372 US 353, and *Ross v Moffitt, supra*, 417 US 600, this Court has recognized a distinction between direct appellate review by right of the merits of legal issues, and discretionary appellate review, which involves evaluation of other factors. An indigent defendant is generally entitled to counsel in a first appeal by right on the merits because such an appeal is important to "a correct adjudication of guilt or innocence," and is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant," *Griffin, supra*, 351 US at 18. Counsel is required "where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot," *Douglas,*

supra, 372 US at 357, and where the appeal on the merits is "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US 387, 404 (1985) (holding that in a first appeal of right on the merits, defendants are entitled not just to counsel, but to the effective assistance of counsel).

In *Ross v Moffitt, supra,* 417 US at 615, this Court recognized that "the function served by discretionary review" is different from direct review of the merits, and involves different constitutional considerations. Counsel was not constitutionally required, in part because that discretionary appeal did not depend on whether a correct adjudication of guilt had been reached below. Rather, it was based on other factors like "whether 'the subject matter of the appeal has significant public interest,' whether 'the cause involves legal principles of major significance to the jurisprudence of the State,' or whether the decision below is in probable conflict with a decision of the [State] Supreme Court." 417 US at 615. The exercise of discretion by the Michigan Court of Appeals in deciding whether to grant leave to appeal is similar, even though the court rules do not explicitly provide such criteria (unlike the criteria specified for applications to the Michigan Supreme Court, see MCR 7.302(B)[24]).

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[24] MCR 7.302(B) provides:

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,

(a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

Convictions on guilty pleas in Michigan are, in a very real sense, "the final step in the adjudication of guilt or innocence of the individual," *Evitts v Lucey*, 469 US at 404. Appeals from guilty pleas in Michigan—whether with or without counsel—are discretionary. In ruling on applications for leave to appeal, the Michigan Court of Appeals is typically not deciding the merits of the legal issues presented; it is only deciding whether the issues have sufficient merit to deserve substantive consideration. The Michigan Court of Appeals may grant or deny the application for leave to appeal; enter a final decision; grant other relief; request additional material from the record; or require a certified statement of proceedings and facts from the lower court. If an application is granted, counsel is appointed and the case proceeds as an appeal of right. MCR 7.205(D)(2), (3), Pet. App 154a; MCL 770.3a(2)(c), Pet. App. 139a.[25] In *People v Tooson*, (*In re Withdrawal of Attorney),* 231 Mich App 504, 505-506; 231 NW 2d 504 (1998), an appeal from a guilty plea, the Michigan

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[25] In 2001, the Michigan Court of Appeals disposed of 7,606 cases. Of the dispositions, 4,468 (59%) were by order and 3,138 (41%) were by opinion. Michigan Supreme Court Annual Report 2001 Judicial Activity And Caseload, p. 14. (March 2002). http://courts.michigan.gov/scao/resources/publications/statistics/msc-coacaseloadreport2001.pdf

In 2001, approximately 40% of these appeals were from criminal convictions (14% from guilty pleas ("Proposal B Appeals") and 26% from jury and non-jury trials). Approximately 2% of the total opinions were in guilty plea appeals, and approximately 23% of the total orders were in guilty plea appeals. Michigan Court of Appeals, "Preliminary Report And Recommendations Of The Delay Reduction Work Group," p. 22, Graphs 5, 6, 7 (March 1 2002). http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_030102.pdf

Court of Appeals held that only the trial court, and not the Court of Appeals, had jurisdiction over an appointed appellate attorney's motion to withdraw based on lack of meritorious issues on appeal:

> When an application for leave to appeal is filed, this Court's jurisdiction is limited to granting an application, denying it, or awarding peremptory relief. MCR 7.205(D)(2), 7.215(A). Plenary jurisdiction attaches only after leave is granted. MCR 7.205(D)(3). Only if and when leave is granted does this Court actually possess plenary power over this class of cases.

When the Michigan Court of Appeals enters an order denying leave to appeal it often uses the following boilerplate language: "The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented." Respondents, like the dissenting opinion in *Bulger, supra*, incorrectly contend that this boilerplate language means that the Michigan Court of Appeals is deciding the substantive merits of legal claims. The Michigan Supreme Court in *Bulger*, however, did not accept this argument. This boilerplate language means no more than that the reasons presented to justify the grant of leave to appeal were insufficient to persuade the Court to exercise its discretion and accept the appeal. Well-established Michigan case law demonstrates that this language does not mean that the Michigan Court of Appeals reviewed the substantive merits of any particular issue.

Orders by both the Michigan Supreme Court and the Michigan Court of Appeals denying discretionary applications for leave to appeal are not decisions on the merits. In *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953), the Michigan Supreme Court quoted from *Malooly v York Heating & Ventilating Corp.*, 270 Mich 240,

247; 258 NW 622 (1935) and said: "The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed. [Citations omitted]."

In *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968) the Michigan Court of Appeals cited and quoted *Peters, Malooly*, and another case, and held that it was not barred from reviewing the merits of an issue even though an application for leave to appeal had previously been denied:

> All three cases involved denials of applications for leave to appeal from interlocutory orders. However, the principle . . . is equally applicable to denials of applications for leave to appeal from final judgments. Such denials are acts of judicial discretion and do not constitute affirmances on the merits.
>
> * * *
>
> [D]enials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. For this reason such denials cannot be afforded res judicata treatment. This Court is not barred from looking into the merits of the present cause. [Citations omitted.]

Even more conclusively, in *State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc*, 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den* 414 Mich 951 (1982), the Michigan Court of Appeals held that two previous orders that denied applications for leave to appeal "for lack of merit in the grounds presented" were not adjudications on the merits.[26]

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[26] Defaults had been entered against two parties, and the trial court denied motions to set them aside. The parties appealed separately, and the

Therefore the doctrines of res judicata and law of the case did not apply: "By denying the interlocutory applications for leave to appeal neither this Court, nor the Supreme Court, ruled on the merits of the challenges to the legal sufficiency of plaintiff's complaint."

In their brief in opposition to the petition in this case, at p. 7, Respondents cite three Michigan Court of Appeals decisions for the proposition that "an order denying leave to appeal for 'lack of merit' in the grounds presented *is* a conclusive determination of the merits of the case, thus precluding further review under the law of the case doctrine." [27] (Emphasis in original.) None of those cases involved decisions on applications for leave to appeal, however. They all involved only the preclusive effect of orders denying defendants' motions to remand in the context of subsequent attempts to relitigate the same issues in the appeals on the merits. Those cases do not contradict the holdings of *Bobenal, supra*, and *Peters, supra*.[28]

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applications for leave to appeal were denied by the Michigan Court of Appeals on April 4, 1980 (Mich App Docket No. 50540) and April 8, 1980 (Mich App Docket No. 50736). Both orders contained the form language: "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented."

[27] *People v Hayden*, 132 Mich App 273; 348 NW 2d 672 (1984); *People v Douglas*, 122 Mich App 526; 332 NW 2d 521 (1983); and *People v Wiley*, 112 Mich App 344; 315 NW 2d 540 (1981).

[28] See, *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 126-127; 346 NW 2d 911 (1984)(Gage, J., concurring in part, dissenting in part):

> In other contexts, the phrase "lack of merit in the grounds presented" has been held to constitute a resolution of legal questions binding on a subsequent panel under the doctrine of "law of the case." *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981); *People v Douglas*, 122 Mich App 526, 530; 332 NW2d 521 (1983). However, denial of leave to appeal an interlocutory order is not the equivalent of affirmance of the order and does not preclude appellate review of the order in a subsequent appeal. *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953). In the context of the order at issue here, the phrase "lack of merit in the grounds presented" refers merely to the grounds presented for immediate appellate review of the interlocutory order; no resolution of the substantive issue presented is expressed.

Similarly, under the Michigan Court Rules, orders of the Michigan Court of Appeals denying leave to appeal doe not fall within the criteria for publication, MCR 7.215(B); are not precedentially binding under the rule of *stare decisis*, MCR 7.215(C); are not even within the definition of "judgments" of the Court; and are "not deemed to dispose of an appeal" for purposes of execution, enforcement, and timing of subsequent events. MCR 7.215(E)(1).[29]

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[29] MCR 7.215:

* * *

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes a provision of a constitution, statute, ordinance, or court rule;

(3) alters or modifies an existing rule of law or extends it to a new factual context;

(4) reaffirms a principle of law not applied in a recently reported decision;

(5) involves a legal issue of continuing public interest;

(6) criticizes existing law; or

(7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported; or

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. * * *

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. * * *

* * *

Respondents' analogy to habeas corpus law is similarly misplaced. In their brief in opposition to the petition, at pp. 8-9, they cite *Harris v Stoval*, 212 F 3d 940 (6th Cir., 2000) and other cases for the proposition that the federal courts treat a Michigan Court of Appeals order denying an application for leave to appeal "for lack of merit in the ground presented" as a decision on the merits for purposes of habeas corpus review. *Harris* does not say that, however. Moreover, the recent decision in *McKenzie v Smith*, 326 F 3d 721, 726-727 (6th Cir., 2003), *cert denied*, 540 US ___; 124 S Ct 1145 (2004) makes it clear that the Sixth Circuit does not consider such orders to be decisions on the merits entitled to deference.

Federal habeas review of a State court's decision is governed by the standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214 (1996). Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC § 2254(d).

In *Harris* the Michigan Court of Appeals had granted a prosecutor's motion to affirm in a summary order that did not

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(E) Judgment.

(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

articulate its reasoning. The Sixth Circuit held that a federal habeas corpus court was nevertheless required to apply the deferential § 2254(d) standard to the *result* of the decision, 212 F 3d at 943, n.1 and accompanying text:

> Where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court's decision, applying the standard articulated above.

In *McKenzie*, on direct appeal the Michigan Court of Appeals had issued a published opinion on the merits of several issues, including the admissibility of certain evidence. In a post-judgment motion the defendant raised several additional issues, including the sufficiency of the evidence. Relief was denied in the trial court and the Michigan Court of Appeals denied an application for leave to appeal in the form language, "for lack of merit in the grounds presented." In a subsequent habeas corpus petition in the Federal court challenging the sufficiency of the evidence, the Sixth Circuit distinguished *Harris*, which involved an order granting a motion to affirm, by saying, 326 F 3d at 727, "we can safely assume that the state court considered the merits of Harris's claim." The *McKenzie* Court distinguished between the first *opinion* involving admissibility and the subsequent form *order* denying leave on the sufficiency issue, 326 F 3d at 727:

> However, as noted above, the Michigan appellate court addressed only the admissibility of the evidence, but never directly addressed the specific issue of whether the evidence was sufficient to support McKenzie's conviction. Accordingly, there are simply no results, let alone reasoning, to which this court can defer. Without such results or reasoning, any attempt to determine whether the state court decision "was contrary to, or involved an

unreasonable application of clearly established Federal law," 28 USC § 2254(d)(1), would be futile.

The Court therefore declined to apply any deference under § 2254(d) to the State court order and instead applied de novo review and granted relief, thus demonstrating that it did not consider the Michigan Court of Appeals form order to be a disposition on the merits.

Michigan has chosen to address the burdens on its appellate court system, in part, by imposing limits on appeals from guilty pleas. It may constitutionally do so since its process provides "adequate and effective appellate review to indigent defendants." *Griffin v Illinois*, 351 US at 20. A State "may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Griffin*, 351 US at 24 (opinion of Justice Frankfurter, concurring in judgment). States are laboratories of federalism that are free, within the limits of the Constitution, to experiment with procedures for handling criminal appeals, *Smith v Robbins*, *supra*, 528 US at 276 ("We will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems'" (citation omitted.)).

The system Michigan has chosen for appeals from guilty pleas complies with the Constitution.

CONCLUSION

For these reasons, Petitioner State Court Judges ask this Court to reverse the judgment of the Court of Appeals and hold that the Respondent Attorneys do not have third-party standing, that indigent criminal defendants convicted by guilty pleas do not have a constitutional right to appointed appellate counsel in a discretionary first appeal, and that MCL 770.3a is constitutional.

Respectfully submitted,

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In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A. CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT JUDGE DENNIS C. KOLENDA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

I. THE RESPONDENT ATTORNEYS LACK STANDING TO CHALLENGE THE MICHIGAN STATUTE 1

A. The Respondent Attorneys Do Not Have Third Party Standing To Present A Constitutional Challenge On Behalf of the Indigent Criminal Respondents Who Themselves Lack Standing Due to the Principles Expressed in *Younger* 2

II. P.A. 1999 NO. 200 IS CONSTITUTIONAL 9

A. The Michigan Statute Provides Only for a Discretionary Appeal Where the Defendant has Pled Guilty or No Lo Contendre 12

B. This Court has More Recently Eroded the Underpinnings for an Equal Protection Challenge to the Michigan Statute 14

C. All Michigan Defendants Who Plead Guilty Specifically Waive Their Right to Appeal . 17

D. The Michigan Statute is a Legitimate Way for the State to Manage Its Criminal Justice System and Indigent Criminal Defendants Have Meaningful Access to the Appellate Process 20

RELIEF REQUESTED 25

INDEX OF AUTHORITIES

Cases

Blackledge v. Allison, 431 U.S. 63 (1977) 17

Bounds v. Smith, 430 U.S. 817 (1977) 21

Boykin v. Alabama, 395 U.S. 238 (1969) 18

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 6

Douglas v. California, 372 U.S. 353 (1963) 12,13,14,15,16,19,20

Fenner v. Boykin, 271 U.S. 240 (1926) 5

Godinez v. Moran, 509 U.S. 389 (1993) 18

Griffin v. Illinois, 351 U.S. 12 (1956) 14,15

Johnson v. Zerbst, 304 U.S. 458 (1938) 17

Lewis v. Casey, 518 U.S. 343 (1996) 14

Mayer v. City of Chicago, 404 U.S.189 (1971) 16

McKane v. Durston, 153 U.S. 684 (1894) 17

Murray v. Giarratano, 492 U.S. 1 (1989) 20

Parke v. Raley, 506 U.S. 20 (1992) 18

Pennsylvania v. Finley, 481 U.S. 551 (1987) 12,24

People v. Bulger, 462 Mich. 495 (2000)
cert. denied 531 U.S. 994 (2000) 4,5,7,8,23

People v. Cobbs, 443 Mich. 276 (1993) 22

People v. DeLoach, 468 Mich. 864 (2003) 8

People v. Grove, 455 Mich 439 (1997) 17

People v. Killebrew, 439 Mich. 1000 (1992) 22

People v. Nixten, 183 Mich. App. 95 (1990) 22

People v. Swirles, 206 Mich App 416 (1994) 22

Powers v Ohio, 499 U.S. 400 (1991) 3

Ross v. Moffitt, 417 U.S. 600 (1974) 1,11,12

Samuels v. Mackell, 410 U. S. 66 (1971) 5,6

San Antonio Independent School Dist. v. Rodriguez, 411 U.S.
1 (1973) 14

Santobello v. New York, 404 U.S. 257 (1971) 17

Steffel v. United States, 415 U.S. 452 (1974) 6

Sun Refining & Marketing Co. v. Brennan, 921 F. 2d 635 (6th
Cir. 1991) 7

Tesmer v. Granholm, 295 F. 3d 536 (6th Circ. 2002) 2,3

Tesmer v. Granholm, 333 F.3d 683 (*en banc* 2003) 13

Traughber v. Beauchane, 760 F.2d 673 (6th Cir. 1985) ... 7

United States v. Broce, 488 U.S. 563 (1989) 21

United States v. MacCollom, 426 U.S. 317 (1976) ... 15,19

Washington v. Davis, 426 U.S. 229 (1976) 14

Younger v. Harris, 401 U.S. 37 (1971) 1,2,4,5,6,7,8

Statutes and Court Rules

28 U.S.C.§1915 12

28 U.S.C. § 2255 19

MCL 770.3a ..... passim

MCL 770.3a(2)(3) 15

MCR 6.005(H)(4) 23

MCR 6.301(C)(2) 10,22

MCR 6.302 11,18

MCR 6.302(B)(6) 18

MCR 6.302(B)(7) 18

MCR 6.311(C) 23

MCR 6.501 23

MCR 6.502 23

MCR 6.505 23

MCR 7.205 23

Sup. Ct. R. 39 (7) 12

SUMMARY OF ARGUMENT

Judge Kolenda's position is that the United States District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeal should have abstained from hearing this case. They should have determined that the Co-Respondent Attorneys lacked *jus tertii* standing to assert that MCL 770.3a violated an indigent criminal defendant's right to appointed counsel for a discretionary appeal. His position is broader than just the doctrine expressed in *Younger v. Harris,* 401 U.S. 37 (1971). It is based on serious concerns about the federal courts' preempting the ability of the Michigan state courts to first consider any legal challenges to P.A. 1999, No. 200, MCL 770.3a.

Judge Kolenda supports the Petitioners' position that MCL 770.3a is constitutional for several reasons. First, the States are not required to provide for any appeal at all from a judgment of conviction. Therefore, Michigan is well within its rights to eliminate appeals as of right from guilty plea convictions; making them discretionary instead. Second, this Court has long held that a State does not have to provide indigent criminal defendants with the entire legal arsenal of tools available to a defendant with financial means. Third, the Michigan system of criminal justice provides indigent defendants with "meaningful access" to the appellate courts within the requirements of *Ross v. Moffitt*, 417 U.S. 600 (1974). And fourth, a criminal defendant who pleads guilty knowingly, voluntarily and intelligently waives both his right to appeal his conviction and his ability to have counsel to assist with any application for leave to appeal.

I. THE RESPONDENT ATTORNEYS LACK STANDING TO CHALLENGE THE MICHIGAN STATUTE

In complete reliance on *Younger v. Harris,* 401 U.S. 37 (1971) and for all the reasons stated in the Defendant Judges' original briefs, both the original Sixth Circuit panel and the *en banc* Court correctly concluded that the District Court erred in failing to abstain from deciding this constitutional challenge on behalf of the criminal defendants themselves. The panel concluded that the indigent Respondents had failed to exhaust their state remedies. *Tesmer v. Granholm*, 295 F. 3d 536, 542 (6th Circ. 2002); 333 F. 3d 683, 691 (6th Cir. *en banc* 2003). Yet, both the panel and the *en banc* Court allowed a complete end run around the principles of *Younger* by allowing the Attorney Respondents *jus tertii* standing to assert the rights of criminal defendants who pled guilty.

This was error which this Court must correct.

A. The Respondent Attorneys Do Not Have Third Party Standing To Present A Constitutional Challenge On Behalf of the Indigent Criminal Respondents Who Themselves Lack Standing Due to the Principles Expressed in *Younger*

Neither the original panel nor the *en banc* Court even attempted to find that the Respondent Attorneys had standing on their own to challenge MCL 770.3a. Instead, they jumped directly to the question of the attorneys' third party standing to raise the constitutional issue applicable only to the indigent criminal Respondents.

By now, the criteria for asserting the constitutional

rights of third parties are well-established. The litigant must have: 1) 'suffered an injury in fact'; giving him or her a 'sufficiently concrete interest' in the outcome of the litigation; 2) a "close relation to the third party'; and 3) there must be some hindrance to the third party's ability to protect his or her own interests. *Powers v Ohio,* 499 U.S. 400, 410-411 (1991). Glossing over the first two criteria, (and often blurring the distinction between all three criteria) the *en banc* majority and dissenting opinions in the Sixth Circuit disagreed only as to the third. The majority was clearly wrong.

It is seriously questionable whether the Co-Respondent Attorneys in this case are able to meet the first and second prongs of the test for *jus tertii* standing. According to the Affidavit contained in the Joint Appendix, attorneys appointed to represent indigent criminal defendants on appeal are paid a flat fee of $350.00. None of the attorney Respondents claim to personally represent any of the three named indigent Respondents. The Attorney Respondents base their standing on their past and potential future representation of indigent criminal defendants in general. *see Tesmer v. Granholm*, 295 F. 3d at 544. However, there is no guarantee that they will receive any appointments. Even if they do, there is no guarantee that these cases will involve criminal defendants who have pled guilty. In addition, none of the indigent Respondents actually pled guilty after the challenged statute was to become effective. They have no right to present a constitutional challenge to MCL 770.3a because they all failed to exhaust their state remedies. Considering these factors, the Respondent Attorneys are unable to satisfy the first and second prongs of the third party standing test.

The third prong of the *jus tertii* standing test - - a

hindrance to the third party's ability to protect his or her own interests - - was the primary reason the *en banc* Sixth Circuit found that the Respondent Attorneys could assert the rights of the Respondent Indigents. The majority's rationale is found at 333 F. 3d at 692-693. First, it concludes that the indigents are hindered by their inability to obtain appointed counsel for their constitutional challenge. This approach bootstraps the merits of the constitutional argument onto the standing issue. Second, it concludes that the indigents will face the issues of federal court abstention which have already prevented them from obtaining standing on their own. Third, the majority concludes that the indigent defendants will have no chance of succeeding within the Michigan system because of the Michigan Supreme Court's decision in *People v. Bulger*, 462 Mich 495, 517-518 (2000); *cert. denied* 531 U.S. 994 (2000). However, as the dissenting opinion so aptly points out, the only obstacle the potential future clients may face relates to any attempt to bring their challenge in federal court. 333 F. 3d at 712 (Rogers, J. dissenting). There would be no obstacles to raising their constitutional challenge in state court after they plead guilty; or later, in federal court, upon a request for habeas corpus. Considering the relationship between *jus tertii* standing and *Younger*, this rationale demonstrates the result-oriented approach of the Sixth Circuit.

The concept of *jus tertii* standing is intertwined with *Younger* in the sense that the issue of *jus tertii* standing is a prudential one; one of "judicial self-governance". *See Singleton v. Wulff*, 428 U. S. 106, 123, 124 (1976) (Powell, J. concurring) And in the case of a suit seeking a declaratory judgment (as this case was) this Court has also held that the "requirements of standing should be strict". *Griswold v. Connecticut*, 381 U.S. 479, 481(1965).

Both opinions from the Sixth Circuit rely strongly on this Court's analysis in *Singleton*, 295 F. 3d at 544; 333 F. 3d at 691, applying it to the facts of this case. In reality, there are very material differences. There is a major distinction between the obstacles facing the indigent women in *Singleton* who wished to have Medicaid-funded abortions and criminal defendants who plead guilty or no lo contendre to felonies. Pregnant women seeking abortions are unlikely to have their cases decided in time to obtain a legal abortion. Unable to achieve their own goal, these women are not likely to pursue the issue on behalf of others.

In contrast, there are no obstacles to a criminal defendant challenging MCL 770.3a within his own criminal case - - in state court. Surely, the ACLU involved in this case would take up the cause of at least one of those potential clients. It did in *Bulger*. Allowing the Attorneys *jus tertii* standing to assert the rights of future indigent criminal defendants virtually guarantees that the Michigan appellate courts will never have the opportunity to examine the state statute. This directly contradicts our system of federalism.

Even before *Younger* this Court recognized the important reasons why "deeply rooted and long-settled principals of equity have narrowly restricted the scope for federal intervention" in the business of the states. *Fenner v. Boykin*, 271 U.S. 240, 243 (1926). *Younger's* companion case, *Samuels v. Mackell*, 410 U. S. 66 (1971) applied the same rationale to a request for a federal declaratory judgment.

> The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, and in all but the most

> exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975)

In his concurring opinion in *Steffel v. United States,* 415 U.S. 452 at 481-482 (1974), Justice Rehnquist warned against the interference with our system of federalism created by the rationale of the lower federal courts here. He explained "the reasons which animate the rule":

> If the rationale of cases such as *Younger* and *Samuels* turned in any way upon the relative ease with which a federal district court could reach a conclusion about the constitutionality of a challenged state statute, a preexisting judgment declaring the statute unconstitutional as applied to a particular plaintiff would, of course, be a factor favoring the issuance of an injunction as 'further relief' under the Declaratory Judgment Act. But, except for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . .," *Younger v. Harris*, supra, at 53, 91 S.Ct., at 755, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and

> state court systems, with a special regard for the State's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not. While the result may be that injunctive relief is not available as 'further relief' under the Declaratory Judgment Act in this particular class of cases whereas it would be in similar cases not involving considerations of federalism. . .

Even the Sixth Circuit has held that there is an adequate opportunity to raise constitutional claims in state court "unless state law clearly bars the interposition of the constitutional claims." *Traughber v. Beauchane,* 760 F.2d 673, 679-680 (6th Cir. 1985). There is no such bar in Michigan. The state judges who would decide those issues "are not inferior to federal judges". They have equal ability to decide constitutional issues and even to interpret federal statutes. *Sun Refining & Marketing Co. v. Brennan*, 921 F. 2d 635, 641 (6th Cir. 1991). That proposition is well-demonstrated by the Michigan Supreme Court's decision in *Bulger*. The real reason for finding indigent criminal defendants would face future obstacles in raising their claims must admit that the result-oriented Sixth Circuit, *en banc*, did not like the outcome of *Bulger*. Neither did it respect this Court's denial of the Petition for Writ of Certiorari to that decision. Instead, the Sixth Circuit opted to create havoc by ignoring the prudential aspects of third party standing which intersect with the principles of *Younger*.

This case was deliberately engineered to avoid the prohibitions of *Younger*. Suit was filed before the effective

date of MCL 770.3a. It was filed, in part, by criminal defendants who were not subject to the statute and who still had state remedies available to them. Before the statute's effective date, the district court commanded all state court judges to automatically appoint counsel for indigent defendants seeking leave to appeal their guilty pleas. Assuming all state circuit judges followed this command, the issue of the statute's constitutionality could and would not be presented to the Michigan appellate courts. Indeed, the federalism issue in this case is highlighted by relevant events surrounding decision on the issue in this case.

Shortly after the United States District Court for the Eastern District of Michigan held the statute unconstitutional and later affirmatively enjoined all state judges to follow its decision, the Michigan Supreme Court, decided *Bulger*. It held that the practice of not appointing counsel for criminal defendants who plead guilty and waive their right to appeal does not violate the Equal Protection or Due Process Clause because "Michigan's scheme gives guilty-pleading defendants a fair opportunity to have their claims heard in our appellate courts." 462 Mich at p. 511. This decision put Michigan's highest court in direct conflict with the lowest federal court. Conflicting decisions within the Sixth Circuit led to confusion among the Michigan trial courts and its Court of Appeals. In fact, even Justices on the Michigan Supreme Court opined they should refrain from deciding a case challenging the constitutionality of MCL 770.3a pending the Sixth Circuit *en banc* decision. *People v. DeLoach,* 468 Mich. 864 (2003). More recently, and despite the *en banc* Sixth Circuit's holding that its decision applies only to the parties in this case, 333 F. 3d at 701-704 but specifically not Judge Kolenda, the Michigan Court of Appeals has remanded cases to him, ordering that he appoint counsel.

Given the "special status of criminal prosecutions in our system", it is crucial to preserve the focus on the direct connection between the vindication of a litigant's interest and enforcement of the state's criminal laws. *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973). Departure from the stricter nexus test in cases involving challenges to a state's criminal laws threatens to grossly undermine the established rules of federalism on which the structure of our country depends. To allow the Attorney Respondents standing in this case to assert the rights of their unknown, but potential clients is to open the floodgates to attorney standing in any situation where future clients may wish to avoid state court review of statute.

For these reasons, both the District Court and the Sixth Circuit should have exercised "judicial self-governance" and held that none of the named Respondents had standing to bring this case.

II. P.A. 1999 NO. 200 IS CONSTITUTIONAL

The Michigan statute, MCL 770.3a, provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere **shall not** have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court **shall** appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if **any** of the following apply:

(a) The prosecuting attorney seeks leave to appeal.

(b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.

(c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.

(d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

(3) The trial court **may** appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if **all** of the following apply:

(a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.

(b) The defendant objected to the scoring or otherwise preserved the matter for appeal.

(c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

(4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other post-conviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

Co-Respondents' facially attacked the statute as unconstitutional as to indigent criminal defendants who cannot afford an attorney to assist with their applications to appeal after a guilty plea. However, their challenge, whether analyzed under due process or equal protection, should not survive under the rationale established in *Ross v. Moffitt*, 417 U.S. 600, 611-612 (1974).

Initially, this Court must consider whether the State must appoint counsel for indigent criminal defendants in all first appeals, even if that appeal is discretionary.

A. The Michigan Statute Provides Only for a Discretionary Appeal Where the Defendant has Pled Guilty or No Lo Contendre

The Michigan statute does not concern a "*first appeal*, granted as a matter of right," as was at issue in *Douglas v. California,* 372 U.S. 353 (1963) (emphasis in original). In *Douglas*, this Court repeatedly used the phrase "first appeal as of right" to describe the circumstances under which counsel must be appointed on appeal for an indigent criminal defendant. This phrase was deliberately chosen. It distinguished the majority's view from that of the dissenting Justices. The dissenting Justices readily recognized the circumstances under which courts are not required to appoint appellate counsel before determining the merits of the appeal, such as petitions for leave to appeal to a state's highest court after an intermediary appeal as of right and a writ of certiorari to this Court, *see Ross v. Moffitt*, 417 U.S. 600, 617 (1974); Sup. Ct. R. 39 (7) and the screening of federal criminal cases that is prescribed by 28 U.S.C.§1915.

Since *Douglas,* this Court has repeatedly rejected opportunities to extend its holding. In *Pennsylvania v. Finley,* 481 U.S. 551 (1987), it repeatedly stated that a criminal defendant has no right to appointed counsel "on discretionary appeals," including those "on direct appeal of his conviction." 481 U.S. at 555. The Sixth Circuit, *en banc*, gave "little weight" to *Finley* because, in its words, "it addresses the right to appointed counsel only by repeating the principles stated in *Douglas* and *Ross.*" *Tesmer v. Granholm,* 333 F.3d 683, 699 (*en banc* 2003). It utterly ignored the

Chief Justice's admonition that "it is the source of [the right to counsel], combined with the nature of the proceedings, that controls the constitutional question." 481 U.S. at 556. In the case of the Michigan statute, the "nature of the proceedings" is an application for leave to appeal from a criminal conviction based on a guilty plea during which the criminal defendant has voluntarily and knowingly waived his right to counsel to assist with his leave application.

Co-Respondents are unable to avoid the reality that Michigan criminal defendants who plead guilty or no lo contendre, are not entitled to a "first appeal as of right", as that phrase is commonly understood. Instead, they have constructed a rather convoluted argument about why the phrase used in *Douglas* really means "any first appeal" (See Co-Respondents' Supplemental Brief on Rehearing En Banc p. 4-7) and why Michigan's constitutional amendment allowing only an application for leave to appeal in guilty plea cases is not a "discretionary appeal", but rather one of right. (Id. at p. 8-10)

Granted, this Court has not more specifically defined terms like "appeal as of right" and "discretionary appeal", but those terms seem obvious. Indeed, despite its holding that MCL 770.3a is unconstitutional, even the *en banc* Sixth Circuit referred to the only appeal available to one who pleads guilty of a felony in Michigan as "a discretionary appeal", not "an appeal of right". *Tesmer v. Granholm,* 333 F.3d at 696 (*en banc* 2003). The common sense point is that when the State provides an automatic opportunity to challenge the legality of the defendant's conviction, then the appeal is one of right. The appeal available in Michigan is not automatic. The Michigan Legislature has provided that any appeal from a guilty plea is by leave only. The Michigan Court of Appeals must grant permission before a defendant who pleads guilty

can challenge either his conviction or his sentence. This is epitome of the concept of discretion.

B. This Court has More Recently Eroded the Underpinnings for an Equal Protection Challenge to the Michigan Statute

Co-Respondents' challenge to the Michigan statute, if it is to succeed at all, must likely depend on a claim under the Equal Protection Clause. None of the decisions in *Ross, Griffin v. Illinois,* 351 U.S. 12 (1956), *or Douglas* depended on the Due Process Clause for their result. As Justice Thomas more recently noted, "it is difficult to see how due process could be implicated in these cases, given our consistent reaffirmation that the States can abolish criminal appeals altogether consistently with due process." *Lewis v. Casey*, 518 U.S. 343, 372 (1996). Indeed, the Court clearly focused the analysis in *Ross* on the Equal Protection Clause, *see* 417 U.S. at 611, applying what appears to be a strict scrutiny analysis to a statute which was facially neutral but had a disparate impact on the indigent criminal defendant. The Co-Respondents' statutory challenge depends on the continued viability of this approach; one that this Court has clearly moved away from.

As Justice Thomas extensively discusses in *Lewis*, this Court's decision in *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973) heralded an end to the strict scrutiny analysis in disparate impact cases under the Equal Protection Clause based on wealth. In his view, *Lewis* and the later decision in *Washington v. Davis,* 426 U.S. 229 (1976) negated "the idea that 'a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of

another." 426 U.S. at 375 (Thomas, J. concurring). As both he and Justice Harlan, in *Douglas*, pointed out, the implications of extending a strict scrutiny analysis to cases presenting challenges based on wealth is to open the door to invalidating every law and regulation which adversely affects or burdens the poor. *Id.* at p 376. Justice Frankfurter expressed concerns, even while concurring in *Griffin,* that if absolute equality was required, a State would no longer be able to "protect itself" from "frivolous appeals" being subsidized by public money, needlessly spent. 351 U. S. at 24. And Justice Blackmun, concurring in *United States v. MacCollom,* 426 U.S. 317 (1976) warned that:

> [t]he Constitution does not require that an indigent be furnished every possible legal tool, no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind.
> 426 U.S. at 330.

The Michigan voters passed a constitutional amendment in 1994 which eliminated an automatic right of appeal in guilty plea cases. Their purpose was to relieve an extraordinary burden on Michigan's court system, created in part by never-ending criminal cases. Obviously, the goal of finality is defeated when there is an appeal. Yet, in some situations, an appeal, even after a guilty plea, may be justified. In many of these situations the Michigan statute, either requires or allows appointment of counsel (e.g. the prosecutor appeals, the judge improperly sentences). MCL 770.3a (2) (3). But the vast majority of appeals from guilty pleas do not fall into this category. They are instead focused on criminal defendants attempting to get out of the bargain they made; hoping for some better result the second time around.

Indeed, in *Douglas*, dissenting Justice Clark plainly stated what everyone knows: "the overwhelming percentage of *in forma pauperis* appeals are frivolous." 372 U.S. at p. 358. Imagine what that percentage might be in cases where the defendant has pled guilty, thereby automatically negating an appeal as to pretrial issues not conditionally reserved for appeal.

What do indigent criminal defendants in this category lose that criminal defendants with money do not? The answer is nothing. Neither has any real chance of overturning his conviction. Both may have the "right" to waste time and money, but the criminal defendant with money wastes only his own. *Cf Mayer v. City of Chicago,* 404 U.S.189, 195 (1971) (appellant with money may choose to waste his own resources on a complete transcript even where one is unnecessary, but the State need not do so in providing an adequate alternative to the indigent defendant).

Several years after the constitutional amendment, the Michigan Legislature took the logical next step of eliminating the right to appointed counsel for defendants who had pled guilty but continued to burden the Michigan Courts with applications for leave to appeal. After all, it cost them nothing, no matter what the risk of loss. Just as there was nothing unconstitutional about Michigan's elimination of the right to appeal a criminal conviction in the case of a guilty plea[1], there was nothing unconstitutional about its elimination of counsel for the purpose of preparing mostly frivolous applications for leave to appeal.

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[1]Indeed, the State could have constitutionally eliminated all rights to appeal, whether from a guilty plea or conviction after trial. See discussion, post.

C. All Michigan Defendants Who Plead Guilty Specifically Waive Their Right to Appeal.

It is well-established that a criminal defendant has no federal or state right to plead guilty or to have his guilty plea accepted by the court. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *People v. Grove*, 455 Mich 439, 461(1997). Necessarily, neither does he have any right to a plea bargain. However, plea bargaining has become an "essential component of the administration of justice" and, "properly administered, it is to be encouraged". 404 U. S. at 260. This Court has recognized its specific benefits to the prosecution and defendants alike, noting that these advantages can only be secured if "dispositions by guilty plea are accorded a great measure of finality." *Blackledge v. Allison,* 431 U.S. 63, 71 (1977). The ultimate goal is the prompt and final disposition of criminal cases.

As part of the plea bargaining process, the defendant is called upon to waive a host of constitutional rights. Since the criminal defendant has no constitutional right to an appeal of right, even from a conviction after trial, *McKane v. Durston,* 153 U.S. 684 (1894), the states are certainly free to eliminate appeals as of right as a condition of the guilty plea process. It is part of what the defendant gives up in exchange for whatever consideration he has been afforded in the bargain.

The Sixth Amendment guarantee of the right to counsel is to protect the criminal defendant "from conviction resulting from his own ignorance of legal and constitutional rights". *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Consistent with Michigan's Constitutional amendment, MCR 6.302, the rule governing the acceptance of guilty pleas in Michigan has included a waiver of the right to appeal since

1994. A defendant pleading guilty is informed that he may seek leave to appeal. After the enactment of MCL 770.3a, the court rule was also conformed to the statute. Defendants pleading guilty are now advised that they are not entitled to the appointment of counsel to assist with their applications for leave. The defendant is also advised that there are certain conditions under which the court must appoint counsel for an appeal and other conditions under which the court may appoint counsel in case he seeks leave to appeal. MCR 6.302(B)(6) & (7).

Waivers in the context of guilty pleas have uniformly been held valid and binding, so long as they are knowingly, voluntarily and intelligently made. A guilty plea entered after a knowing, voluntary and intelligent waiver is considered in itself a conviction. *Boykin v. Alabama,* 395 U.S. 238 (1969). It waives the right to jury trial, the right to confront one's accusers and the right not to incriminate oneself. *Parke v. Raley,* 506 U.S. 20, 29 (1992). There is no valid reason why it may not also waive "the right"[2] to seek leave to appeal the conviction which has been established by the plea itself. Indeed, a criminal defendant can legally waive the right to counsel even without having pled guilty. *see Godinez v. Moran*, 509 U.S. 389, 400 (1993).

Every criminal defendant, those with financial means and those without, makes a personal choice whether to give up the right to trial (and, potentially, appeal) in favor of a plea bargain. He need not make this choice. Any criminal

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[2]Meaning only the ability, under Michigan law, to seek leave to appeal as opposed to a constitutional right which the defendant does not have since there is no constitutional right to appeal at all.

defendant, solvent or not, may insist on the right to trial, thereby preserving his later right to appeal his conviction. In the case of the indigent criminal defendant, this strategy will also preserve inviolate his right to appointed counsel on appeal.[3] This Court has previously held that indigent criminal defendants may be charged with the responsibility for their choices and waivers. see *United States v. MacCollom,* 426 U.S. 317, 324-325 (1976) (the equal protection clause does not require a criminal defendant who has waived his right to direct appeal automatically be furnished with a free transcript for his collateral attack under 28 U.S.C. 770 § 2255). Noteworthy also was the Court's rationale that a contrary holding would actually put the indigent criminal defendant in a position superior to "a similarly situated prisoner of some, but not unlimited, means, who presumably would make an evaluation [of his likelihood of success] before he spent his own funds for a transcript." 426 U. S. at 328.

Ultimately, the decision in *Douglas*, that an indigent criminal defendant was entitled to appointed counsel "on his first appeal as of right" turned on the conclusion that, without counsel, such a defendant was provided only a "meaningless ritual" rather than a "meaningful appeal" "where the record is unclear" or "errors [in the record] are hidden". 372 U.S. at 358. These circumstances are far less likely in a guilty plea case. And, in considering *Ross'* admonition that the question of the constitutionality of eliminating appointed counsel in the case of discretionary appeals "is not one of absolutes, but one of degrees", 417 U.S. at 612, it is also

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[3]Similarly, a defendant of limited means, but not indigent, will have to decide whether it is wise to spend his resources on a trial or accept the likely advantages of a plea bargain.

necessary to consider the statute in the context of Michigan's other relevant criminal procedures.

D. The Michigan Statute is a Legitimate Way for the State to Manage Its Criminal Justice System and Indigent Criminal Defendants Have Meaningful Access to the Appellate Process

As previously discussed, a State need not provide any appeal as of right from a criminal conviction, much less from a guilty plea. This Court has also recognized that states may choose how to provide indigent criminal defendants with "meaningful access" to the whatever court procedures may be available. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J. concurring). However, within this framework, "the intricacies and range of options are of sufficient complexity that state legislatures. . . must be given 'wide discretion' to select appropriate solutions. *Id.*

The Michigan statute, unlike the rule of criminal procedure at issue in *Douglas v. California,* 372 U.S. 353 (1963), does not put the Michigan Court of Appeals in the position of acting as an indigent defendant's appellate advocate, trying to ferret out meritorious issues for a ppeal. Rather, it specifically defines the circumstances under which counsel must or may be appointed on appeal to represent an indigent criminal defendant.

There is no claim in this case that Michigan has violated any of its obligations to indigent prisoners other than the alleged right to counsel to assist with applications for

leave to appeal guilty pleas.[4] A review of its various criminal procedures, even those specifically applicable to guilty plea cases, demonstrates that the State has amply complied with *Ross'* mandate that indigent criminal defendants have "meaningful access" to the appellate system.

Obviously, the issues available for appeal after a guilty plea are severely limited. That is because the ensuing conviction comprehends all the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence". *United States v. Broce,* 488 U.S. 563, 568 (1989). Most appeals will pertain to sentencing, which MCL 770.3a specifically addresses. The trial court is required to appoint counsel for an indigent criminal defendant if the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines. It may appoint counsel if the defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable, but only if: 1) the defendant objected to the scoring or otherwise preserved the matter for appeal and 2) the sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.

In addition, Michigan follows some specific rules and procedures which may eliminate the need for appeals related

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[4]For example, there is no claim that Michigan fails to "assist inmates in the preparation and filing of meaningful papers [including applications for leave to appeal] by providing them with adequate law libraries or adequate assistance from persons trained in the law", *Bounds v. Smith,* 430 U.S. 817, 828 (1977).

to sentencing. In *People v. Killebrew,* 439 Mich. 1000 (1992), the Michigan Supreme Court first established that a defendant who pleads guilty has the right to withdraw his plea if the trial judge declines to follow a plea bargain, either for a specific sentence or for a prosecutor's sentencing recommendation. Later, in *People v. Cobbs,* 443 Mich. 276 (1993), the Michigan Supreme Court expanded the extent to which the trial judge may become involved in "sentencing discussions". Either the prosecutor or the defendant may ask the court, at the time of plea-taking, for a preliminary evaluation as to the defendant's expected sentence. If the court later determines that the evaluated sentence is inappropriately light, the defendant has the absolute right to withdraw his plea. 443 Mich. at 283. Additionally, a defendant who claims that the prosecutor breached a plea bargain is entitled to specific performance. *People v. Nixten,* 183 Mich. App. 95, 99 (1990). He must be re-sentenced to obtain the benefit of his bargain. *People v. Swirles,* 206 Mich App 416, 419 (1994). Clearly, these rules and procedures eliminate a large portion of the potential appeals associated with guilty plea cases - - i.e. the defendant does not like his sentence.

The Michigan statute also addresses the right to the appointment of counsel in the event that: (1) the prosecutor seeks leave to appeal; 2) the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal; or 3) the defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.

Otherwise, the most likely remaining issues after a guilty plea concern the voluntariness of the plea itself and whether the defendant received the effective assistance of counsel during the trial court procedures. Michigan rules and procedures specifically deal with these situations and give the

guilty-pleading defendant additional options.

According to Michigan procedure, a criminal defendant convicted by his own plea must first move the trial court to set the plea aside after sentencing but before he or she can appeal the issue of its voluntariness. MCR 6.311(C). According to MCR 6.005(H)(4), trial counsel appointed for a criminal defendant is responsible for any post-conviction motions unless an appellate attorney has been appointed. In order to seek leave to appeal, a person must provide a transcript with the application. MCR 7.205. Therefore, as the Michigan Supreme Court pointed out in *People v. Bulger,* 462 Mich 495, 517-518 (2000), a criminal defendant seeking leave to appeal without counsel has all these tools available in preparing his or her application for leave to appeal. Certainly, this is an important component in considering his or her "meaningful access" to the appellate system.

If the criminal defendant claims the issue is ineffective assistance of counsel, another remedy is mandatory which will also provide him with appointed counsel. MCR 6.501 governs the defendant's right to post-appeal or post-conviction relief. If the question of ineffective assistance depends on factual questions (as most do), the defendant is required to bring a motion to set aside his conviction under MCR 6.502. He may apply for appointment of counsel and the court may grant that request at any time during the proceedings. MCR 6.505. It is required to appoint counsel if it directs that oral argument or an evidentiary hearing be held. *Id.* If a later appeal is desired, the indigent defendant has all the transcripts and the attorney's work product from these proceedings on which to rely in formulating his application for leave to appeal.

In addition to all these procedures and protections,

Michigan also provides defendants seeking leave to appeal with a user-friendly form, complete with detailed instructions regarding its use and all related procedures. A copy of the form is attached in the Appendix to this Brief.

In *Ross,* this Court recognized that the requirements of equal protection do not require exact equality. An appellate system must be 'free of unreasoned distinctions'. Indigent criminal defendants must have an adequate opportunity to present their claims fairly within the adversary system. But the Fourteenth Amendment 'does not require absolute equality or precisely equal advantages." 417 U.S. at 612. "And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Id* at p. 616. Specifically, in *Ross* this Court held that "the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review." 417 U.S. at 614-615; *Pennsylvania v. Finley,* 481 U.S. 551 (1987). Considering that there is no "trial record" in the case of a guilty plea[5], the Michigan appellate system for a discretionary first appeal amply comports with the requirements established in *Ross.*

Considering the overall structure of Michigan's criminal justice system, it is difficult, if not impossible, to conclude that indigent defendants are denied any more "meaningful access" to the appellate courts than defendants with financial means.

---

[5]But the defendant will have free copies of any relevant transcripts, such as the plea and sentencing proceedings.

RELIEF REQUESTED

Wherefore, Appellant, Judge Dennis Kolenda, respectfully requests that this Court reverse the decision of the *en banc* Sixth Circuit.

Respectfully submitted:

Dated: March 31, 2004

_____

Judy E. Bregman

APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE

Use this form if you pled guilty, guilty but mentally ill, or nolo contendere for a crime, and you want to appeal your conviction or sentence. See MCR 7.205 for details on filing an application for leave to appeal.

When to file your application for leave to appeal

- Michigan Court Rule requires that you file the application within 12 months after the circuit court entered your judgment of sentence.
- Your appeal is not "filed" until it has been received by a clerk of the Court of Appeals. That means that if you mail your documents, they are not "filed" when you place them in the mailbox. They are filed when they reach the Court of Appeals and they are stamped by the clerk with the date and time of their arrival.

What to do before preparing and filing your application for leave to appeal

- The Court of Appeals needs copies of certain documents to process the appeal. You will probably need to prepare a letter to the circuit court requesting these documents. If you do not receive one or more of these items before filing your application, make 6 copies of the letter to file with the Court of Appeals to show that you have requested them. These documents are:

1. A copy of the register of actions for your case. If you receive it before you file your application, make 6 copies of it.
2. A copy of the plea and sentencing hearing transcripts. If you receive them before you file your application, make 1 copy of them.
3. If you are raising a sentencing issue, the presentence information report. If you receive it before you file your application, make 1 copy of it.
4. Get your prisoner account statement for the past 12 months. Make 1 copy.
5. Make 5 copies of your judgment of sentence.

Complete the application for leave to appeal and prepare for filing

A copy of the application with instructions on how to fill it out is provided in the form. Print or type.

- Complete the application for leave to appeal including the cover sheet using the instructions. Sign and date the "original" of the application. Make 5 additional copies.
- Attach one copy of the judgment of sentence and register of actions to each of the applications. If you have not received one or both of these items from the circuit court, attach a copy of the request letter instead.

What happens if you don't file your application for leave to appeal correctly?

- If you omit one of the required documents, the clerk's office in the Court of Appeals will send you a letter explaining what is defective about your filing and will give you 21 days to correct it. For example, if you wrote a letter to the circuit court asking for the register of actions, but that court has not sent it before you must file your application, then provide a copy of the letter to the Court of Appeals with your application. You will receive a defect letter from the Court of Appeals giving you 21 days to send the register of actions. By then, you should have received the register of actions and can forward it to the Court of Appeals.

How to file the application

- You must file with the Court of Appeals the following documents to correctly submit an application for leave to appeal from your criminal conviction or sentence:

1. Five copies of an application for leave to appeal (including a statement of delay if applicable), one copy signed.
2. Five copies of the judgment of sentence you are appealing.
3. Five copies of the current circuit court register of actions. If the register of actions is not available when you file your application, substitute it with the request letter to the circuit court.
4. One copy of the transcripts of your plea and sentencing hearings. If the transcripts are not available when you file your application, substitute it with the request letter to the circuit court.
5. One copy of your prisoner account statement and certification, if applicable.

6. A check or money order for $375 to cover the entry fee. If you cannot afford to pay the entry fee, then you must file a motion to waive fees, along with an affidavit of indigency and, if you are incarcerated, a prisoner account statement and certification for the past 12 months.

- Send one copy of the application and attachments to the prosecutor in the county where you were convicted. Complete the proof of service on the "original" and on your copy showing that you mailed a copy to the prosecutor.

Where to file your application for leave to appeal

- Send the "original" application and 4 copies of the application for leave to appeal and attachments, along with one copy of the transcripts (if available) and one copy of the Prisoner Account Statement (if applicable), to the Clerk of the Court of Appeals at one of the addresses below.

Michigan Court of Appeals
1001 Woodward Avenue
Suite 900
Detroit, MI 48226-1970
(313) 256-9212

Michigan Court of Appeals
American Center Bldg.
27777 Franklin Road,
Suite 645
Southfield, MI 48034-8256
(248) 353-6763

Michigan Court of Appeals
Washington Square Bldg.
109 W. Michigan Avenue
Lansing, MI 48909-7522
(517) 373-0786

Michigan Court of Appeals
State of Michigan Office Bldg.
350 Ottawa Street, NW
Grand Rapids, MI 49503-2349
(616) 456-1167

More Instructions

- Keep one copy of the application and attachments for yourself.

- If there are any items which you ordered from the circuit court but did not receive prior to sending your application, you must forward the appropriate number of copies of these items to the Court of Appeals when you receive them (5 copies of the register of actions, 5 copies of the judgment of sentence, 1 copy of transcripts, 1 copy of presentence information report). You must also send a copy of these items to the prosecutor, and provide a proof of service to the Court of Appeals that you served the prosecutor with these items. You must date and sign this proof of service.

Approved, SCAO

STATE OF MICHIGAN COURT OF APPEALS	APPLICATION FOR LEAVE TO APPEAL AFTER SENTENCING ON PLEA OF GUILTY OR NOLO CONTENDERE	_____CIRCUIT COURT _____ COUNTY CASE NO:

THE PEOPLE OF THE STATE OF MICHIGAN	v	Defendant's name, address, and inmate no.

Using the information from your judgment of sentence form, enter the number of the circuit court, the county, and the case number in the upper right-hand corner. Follow the instructions for each of the items. Print or type all information.

STATEMENT OF DELAY

1. This application is being filed more than 21 days after entry of the judgment of sentence because:
   - ☐ I did not know until recently that I could appeal the decision.
   - ☐ I could not afford the postage and copying costs to file this application.
   - ☐ I did not know until recently how to appeal the decision.
   - ☐ I needed to get help to complete this application.
   - ☐ Other: _____ (Explain)

APPLICATION

2. I was found guilty of the crime(s) as stated below:

Count	PLEA G	PLEA NC	CRIME	CHARGE CODE(S) MCL citation/PACC Code

*Plea: Check "G" for guilty plea; check "NC" for nolo contendere

3. I was sentenced as stated below by Judge _____ (Name of judge)

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION

4. ☐ I filed with the trial court a request for appointment of an attorney and affidavit of indigency on _____ (Date)

continued on page 2

APPLICATION continued

5. STATEMENT OF QUESTIONS INVOLVED

State the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence. If you need more space, attach additional pages.

6. STATEMENT OF FACTS

Give any facts not stated in items 2, 3, and 4 on page 1 that are relevant to this appeal. You must also state the transcript pages or other parts of the record that support your facts. If you need more space, attach additional pages.

continued on page 3

APPLICATION continued

7. ARGUMENTS

For each issue listed in item 5. on page 2, state the law that supports your position and explain how the law applies to the facts of your case. If you need more space, attach additional pages.

8. RELIEF REQUESTED

State what you want the Court of Appeals to do.

Date

Signature

PROOF OF SERVICE

I certify on this date a copy of this application and appropriate attachments were served on the prosecutor of

_____ County by ☐ personal service. ☐ mail.

Date

Signature

(12)

JUNE 4, 2004

03-407

IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE, and JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent,

—v.—

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHER M. FITZGERALD, and MICHAEL D. VOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Do criminal defense attorneys who would be denied appointments to represent indigent criminal defendants under a state statute have standing to challenge the statute?

2. Does the Fourteenth Amendment guarantee the assistance of counsel to an indigent criminal defendant who wishes to file a first-tier direct application for leave to appeal to an intermediate appellate court from a plea-based felony conviction and sentence, where the appellate court grants or denies such applications for leave to appeal on the merits?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....5

ARGUMENT.....7

I. Respondents Fitzgerald and Vogler Have Standing to Challenge the Constitutionality of the Statute Under the Doctrine of *Jus Tertii*.....7

A. Fitzgerald and Vogler Have Suffered an "Injury In Fact".....8

B. Fitzgerald and Vogler Have a Sufficiently Close Relationship With Indigents Who Will Be Injured by the Statute.....11

C. Significant Obstacles Prevent Indigent Defendants From Asserting Their Own Rights.....15

D. *Jus Tertii* Standing Is Appropriate In This Case.....17

II. The Denial of Appointed Counsel to Indigent Defendants Filing Their Initial Direct Appeals on the Merits After Pleading Guilty or *Nolo Contendere* Violates the Fourteenth Amendment.....21

A. An Application for Leave to Appeal to the Michigan Court of Appeals from a Plea-Based Felony Conviction Is Not a "Discretionary" Appeal Within the Meaning of *Douglas* and *Ross*.....22

1. "Discretionary" Appeals Do Not Include First-Tier Direct Appeals Decided on the Merits.....23

2. The Appeal At Issue in This Case Is Not "Discretionary."".....29

B. Indigent Defendants Forced to File Applications for Leave to Appeal Without Counsel Will Receive a "Meaningless Ritual" Instead of Meaningful Appellate Review.....32

1. A Typical Indigent Cannot Identify or Coherently Argue Appellate Issues Arising From His Plea-Based Appeal or Overcome the Procedural Hurdles Arising in a First-Tier Appeal.....33

2. Indigents Cannot Rely on Trial Counsel's Work Product to Perfect First-Tier Direct Appeals.....37

3. The Statutory Exceptions Are Insufficient to Provide Indigents Meaningful Access to the Michigan Court of Appeals.....38

C. An Indigent Defendant Cannot Be Forced to Waive His or Her Right to Equal Treatment and Due Process As a Condition of Pleading Guilty.....41

CONCLUSION.....44

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000).....3, 34, 37

Baldwin v. Reese,
___ U.S. ___, 124 S.Ct. 1347 (2004).....19

Bordenkircher v. Hayes, 434 U.S. 357 (1978).....41

Bulger, et al. v. Judges of Tenth Circuit Court,
562 N.W.2d 200 (Mich. 1997).....3, 16

Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987).....23, 29, 33

Burns v. Ohio, 360 U.S. 252 (1959).....42

Cabaniss v. Cunningham,
143 S.E.2d 911 (Va. 1965).....27, 29

Campbell v. Louisiana, 523 U.S. 392 (1998).....15

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989).....10, 12, 17

Carey v. Population Services, 431 U.S. 678 (1977).....13

City of Revere v. Massachusetts General Hospital,
463 U.S. 239 (1983).....12, 17

Coleman v. Thompson, 501 U.S. 722 (1991).....27, 30

Contineri v. Clark,
2003 WL 21771236 (Mich. Ct. App. 2003).....1, 30

Coppedge v. United States, 369 U.S. 438 (1962).....40

Craig v. Boren, 429 U.S. 190 (1976).....10, 11, 12, 13

Diamond v. Charles, 476 U.S. 54 (1986).....10

DiCicco v. City of Grosse Poine Woods,
2002 WL 346126 (Mich. Ct. App. 2002).....31

Douglas v. California, 372 U.S. 353 (1963)..... passim

Edmonson v. Leesville Concrete Company, Inc.,
500 U.S. 614 (1991).....8, 14

Ellis v. United States, 356 U.S. 674 (1958) 27, 28, 29

Evitts v. Lucey, 469 U.S. 387 (1985)..... passim

Friends of the Earth v. Laidlaw Environmental Systems, Inc.,
528 U.S. 167 (2000).....8

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).....9

Georgia v. McCollum, 505 U.S. 42 (1992).....14, 15

Great Lakes Realty Corp. v. Peters,
57 N.W.2d 901 (Mich. 1953).....31

Griswold v. Connecticut, 381 U.S. 479 (1965).....13

Jackson v. Virginia, 443 U.S. 307 (1979)..... 30

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....8, 18

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 22

Martinez v. Court of Appeal of California,
528 U.S. 152 (2000) 34

Muhammad v. Close,
___ U.S. ___, 124 S.Ct. 1303 (2004) 41

Murray v. Giarratano, 492 U.S. 1 (1989) 25

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 19

Peguero v. United States, 526 U.S. 23 (1999) 40

People v. Artman,
553 N.W.2d 673 (Mich. Ct. App. 1998) 40

People v. Berry,
157 N.W.2d 310 (Mich. Ct. App. 1968) 31

People v. Bulger, 614 N.W.2d 103 (Mich. 2000) ..... passim

People v. Douglas,
332 N.W.2d 521 (Mich. Ct. App. 1983) 30

People v. Graves,
523 N.W.2d 876 (Mich. Ct. App. 1994) 39

People v. Hayden,
348 N.W.2d 672 (Mich. Ct. App. 1984) 1, 30

People v. Hunter,
507 N.W.2d 768 (Mich. Ct. App. 1993) 39

People v. Nixten,
454 N.W.2d 160 (Mich. Ct. App.1990) 39

People v. Orweller,
494 N.W.2d 753 (Mich. Ct. App. 1992) 39

People v. Plaza, 617 N.W.2d 687 (Mich. 2000) 35, 36

People v. Resler,
532 N.W.2d 907 (Mich. Ct. App. 1995) 39

People v. Weathers,
2003 WL 21362810 (Mich. Ct. App. 2003) 2, 30

People v. Wiley,
315 N.W.2d 540 (Mich. Ct. App. 1981) 30

Perez v. State, 4 S.W.3d 305 (Tex. Ct. App. 1999) 29

Pierce v. Society of the Sisters, 268 U.S. 510 (1925) 13

Powers v. Ohio, 499 U.S. 400 (1991) 8, 11, 14, 15

Rhodes v. Leverett, 239 S.E.2d 136 (W.Va. 1977) 32

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 33, 34

Ross v. Moffitt, 417 U.S. 600 (1974) ..... passim

Sabaugh v. Riga,
2003 WL 21362981 (Mich. Ct. App. 2003) 31

Secretary of State of Maryland v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 15

Singleton v. Wulff, 428 U.S. 106 (1976) 10, 11

Smith v. Robbins, 528 U.S. 259 (2000) 27, 28, 40

State v. Bobenal Investment,
314 N.W.2d 512 (Mich. Ct. App. 1981) 31

State v. Cooper, 498 A.2d 1209 (N.H. 1985).....32

State v. Trowell, 739 So.2d 77 (Fla. 1999).....29

Steffel v. Thompson, 415 U.S. 452 (1974).....18

Swenson v. Bosler, 386 U.S. 258 (1967).....37, 38

United States Department of Labor v. Triplett,
494 U.S. 715 (1990) 12, 14, 17

United States v. Hays, 515 U.S. 737 (1995).....8

United States v. MacCollom, 426 U.S. 317 (1976).....25

Whitmore v. Arkansas, 495 U.S. 149 (1990).....10

Wooley v. Maynard, 430 U.S. 705 (1977).....18

Younger v. Harris, 401 U.S. 37 (1971).....18

Constitutional Provision and Statutes

U.S. Const., Amend. XIV..... passim

28 U.S.C. § 2254 20

Md. Ann. Code, art 27A § 4 24

Md. Code Ann. § 12-1302(e) 23

Me. R. App. P. 20.....23

Me. R. Crim. P. 44(a)(2) 24

Mich. Comp. Laws § 770.3a (2000)..... passim

Mich. Comp. Laws § 777.1 34

Mich. Ct. R. 6.301(C)(2).....39

Mich. Ct. R. 7.205(D)(3).....1

Mich. Sup. Ct. Admin. Order 1981-7.....9

Mich. Sup. Ct. Admin. Order 1989-3(4)-(5).....9

N.C. Gen. Stat. § 15A-1444(e).....24

N.C. Gen. Stat. § 7A-451 24

N.H. S.Ct. R. 4 23

N.Y. County Law § 717(1).....24

N.Y. Crim. Proc. L. §§ 450.10(1) 24

Nev. R. App. P. 3C.....32

Nev. Rev. Stat. § 178.397 32

Okla. Stat. Tit. 22 § 1051(a).....24

Okla. Stat. Tit. 22 § 1356 24

Va. Code § 17.1-406(A).....32

Va. Code § 19.2-163.3 .....24, 32

W.Va. R. Crim. P. 44(a).....24

Other Authorities

Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431 (1996) 2, 37, 39, 40

U.S. Dep't of Educ., *Literacy Behind Prison Walls*, NCED 1994-102.....35

STATEMENT OF THE CASE

Appeals from Plea-Based Felony Convictions in Michigan

In 1994, Article 1, § 20 of the Michigan Constitution was amended to provide that, "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, *except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court*." Pet. App. 138a (amended language emphasized). The purpose of this amendment was to reduce the workload of the Michigan Court of Appeals by streamlining the appellate process for appeals from plea-based felony convictions. *See People v. Bulger*, 614 N.W.2d 103, 106-107 (Mich. 2000) (discussing history of amendment).

Since 1994, therefore, a criminal defendant who pleads guilty to a felony in Michigan and who believes that error occurred at his or her sentencing or at some other point in the proceedings must file an application for leave to appeal to the Michigan Court of Appeals. If the application is granted, the appeal proceeds to full briefing and argument. Mich. Ct. R. 7.205(D)(3). Pet. App. 155a. If, on the other hand, the Michigan Court of Appeals denies the application, it does so by issuing a standard order that "uniformly state[s] that leave is denied 'for lack of merit in the grounds presented.'" *Bulger*, 614 N.W.2d at 124 (Cavanagh, J., dissenting); *see also* J.A.22-27 (examples of orders denying leave to appeal from plea-based convictions). The Michigan Court of Appeals treats its orders denying leave to appeal "for lack of merit in the grounds presented" as decisions on the merits with preclusive effect under the law of the case doctrine. *See, e.g., People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) (holding order denying application "for lack of merit in the grounds presented" was decision on merits barring relitigation); *Contineri v. Clark*, 2003 WL 21771236 (Mich. Ct. App. 2003) (holding law of the case barred relitigation of issues raised in previous application

denied "for lack of merit in the grounds presented" because order "did, in fact, express an opinion on the merits"); *see also People v. Weathers*, 2003 WL 21362810 (Mich. Ct. App. 2003) (same).

More than ninety percent of felony convictions in Michigan are obtained by plea. *See* Petitioner's Brief at 30 n. 21 (collecting statistics). Most indigent defendants who plead guilty in Michigan do not appeal. *Compare id.* (citing statistics showing that there were 38,196 felony convictions by guilty plea in 2001) *with* Affidavit of Terence R. Flanagan, J.A. 29 (observing that there were approximately 2000 requests for appointment of appellate counsel in plea cases in 1999). Those that do appeal primarily raise sentencing issues. *See* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438 (1996) (discussing Michigan State Bar Report finding "a significant majority of guilty plea appeals involve only sentencing issues").

The Trial Judges' Denial of Counsel to Indigent Appellants and the *Bulger* Decision

Since the 1994 amendment to the state constitution did not eliminate the right to counsel for first appeals, the vast majority of Michigan trial judges continued to routinely appoint counsel to indigent plea defendants who requested the assistance of appellate counsel. *See* Flanagan Affidavit, J.A. 29. However, a few trial judges, including Petitioners Kowalski, Crane and Heathscott, began to routinely deny appellate counsel to such indigents. Pet. App. 3a.

In 1996, a group of thirteen indigents who had been denied the appointment of appellate counsel filed, with the assistance of a volunteer attorney, an original complaint in the Michigan Supreme Court requesting that their trial judges be ordered to appoint appellate counsel to assist them with their applications for leave to appeal. The Michigan Supreme Court

dismissed the complaint but ordered that counsel be appointed to the indigents for the limited purpose of arguing to the trial judges that the indigents were entitled to appointed counsel for their individual appeals. *Bulger, et al. v. Judges of Tenth Circuit Court*, 562 N.W.2d 200 (Mich. 1997). After the trial judges held that the indigents were not entitled to appellate counsel, one of those indigents, still assisted by counsel appointed solely to argue that he had a right to the assistance of appellate counsel, appealed that decision back to the Michigan Supreme Court. *See Bulger*, 614 N.W.2d at 105-106 (describing procedural history). A divided Michigan Supreme Court ultimately held that indigent plea defendants enjoyed no constitutional right to the assistance of appellate counsel. *Id.* at 110-115. This Court subsequently denied certiorari. *Bulger v. Michigan*, 531 U.S. 994 (2000).

The Statute and the Present Litigation

While the *Bulger* case was still pending in the Michigan Supreme Court, the Michigan Legislature enacted Mich. Comp. Laws § 770.3a (2000) ("the statute"), which provides that Michigan judges "shall not" appoint appellate counsel to assist indigent defendants who wish to file an application for leave to appeal from a plea-based conviction or sentence unless the indigent received an upward departure from the sentencing guidelines or was permitted to enter a conditional plea. Pet. App. 139a-140a. A trial judge "may" appoint appellate counsel for an indigent defendant if he or she has preserved an outcome-determinative challenge to the judge's scoring of the sentencing guidelines, but the judge is under no obligation to do so. Pet. App. 140a. If the indigent wishes to raise any other type of issue on appeal, such as whether the judge erroneously ordered the sentences to run consecutively, whether the judge erroneously denied credit for prior incarceration, whether the sentences and/or the convictions violate double jeopardy, whether the sentence violates the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or whether the judge illegally

ordered restitution, the statute prohibits the appointment of appellate counsel.

This lawsuit was filed before the statute took effect. The plaintiffs included two distinct groups. The first group consisted of Respondents Tesmer, Carter and Schnell, who had been denied appellate counsel by Petitioners Kowalski, Crane and Heathscott, respectively. J.A. 14-15. These three plaintiffs therefore challenged only the constitutionality of the pre-statutory practice of those particular judges. J.A. 17, Pet. App. 100a.

The second group of plaintiffs consisted of Respondents Fitzgerald and Vogler, each of whom is an appellate attorney listed on his home county's roster of attorneys qualified to receive appointments to represent indigents on appeal. J.A. 16. Fitzgerald receives appointments from the trial court in which Judges Crane and Heathscott sit, and Vogler receives appointments from the trial court in which Judge Kowalski sits. J.A. 16. Therefore, Fitzgerald and Vogler complained that the pre-statutory practice of Kowalski, Crane and Heathscott of routinely denying the appointment of counsel to indigents had reduced their incomes because it meant that they and the other attorneys on the rosters received fewer appointments. J.A. 16. Similarly, since the statute would deny appellate counsel to most indigent defendants, Fitzgerald and Vogler complained that the statute would also reduce their incomes by reducing the number of appointments for each attorney on the rosters. J.A. 16.

The district court issued a declaratory judgment that both the statute and the practice of the judges violate the Fourteenth Amendment. Pet. App. 116a-124a. The district court also concluded that Respondent attorneys had standing to challenge the judges' pre-statutory practice and the statute under the doctrine of *jus tertii*. Pet. App. 93a-100a. However, the district court abstained from adjudicating Respondent Tesmer's

challenge to the pre-statutory practice of the judges since he still had proceedings pending in the state appellate courts. Pet. App. 100a-107a.

Petitioners appealed that decision to the Sixth Circuit.[1] A panel of that court agreed with the district court that Respondent attorneys have *jus tertii* standing, Pet. App. 73a-77a, but reversed the district court's refusal to abstain from hearing the claims of all three Respondent indigents and the district court's conclusion that the statute is unconstitutional. Pet. App. 67a-73a, 77a-84a.

On rehearing *en banc*, the Sixth Circuit held that the district court should have abstained from hearing the claims of all three Respondent indigents. Pet. App. 6a-10a. The *en banc* court also agreed with the district court that the Respondent attorneys have *jus tertii* standing. Pet. App. 10a-19a. The *en banc* court then affirmed the district court's conclusion that the statute is unconstitutional. Pet. App. 19a-29a.

SUMMARY OF ARGUMENT

Respondents Fitzgerald and Vogler may challenge the constitutionality of the statute as they meet each of the three requirements of *jus tertii* standing. First, Petitioners have never denied that Fitzgerald and Vogler, who are appellate lawyers on the roster of attorneys to be assigned to indigent appellants, will suffer loss of income if Michigan is permitted to deny appellate counsel to most indigent felony defendants who plead guilty. Since the Court has repeatedly recognized in similar contexts that economic loss is the classic injury in fact, Fitzgerald and Vogler easily satisfy the first prong of *jus tertii* standing.

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[1] The district court subsequently enjoined Respondent Kolenda, a state court judge who was not a named defendant, from continuing to deny appellate counsel to indigents. Pet. App. 132a-136a. Respondent Kolenda appealed separately to the Sixth Circuit, which ultimately ruled that the injunction against him was improper. Pet. App. 29a-35a.

Since Petitioners never challenged the second and third prongs of *jus tertii* standing below, the Court should not entertain Petitioners' arguments now. In any event, Fitzgerald and Vogler satisfy both of those prongs. This Court has repeatedly recognized that the attorney-client relationship, including an attorney's relationship with future or prospective clients, satisfies the second prong. As for the third prong, the denial of appellate counsel is precisely the type of serious impediment that would prevent indigent defendants from raising and litigating their constitutional rights on their own. This Court has repeatedly observed that a typical indigent defendant is completely incapable of overcoming the procedural hurdles necessary to perfect a first direct appeal or identifying or coherently raising his or her own appellate issues. Therefore, *jus tertii* standing is appropriate.

The Michigan statute, which would deny appellate counsel to the great majority of indigent defendants who wish to appeal from their plea-based convictions and sentences, violates the Fourteenth Amendment. An application for leave to appeal to the Michigan Court of Appeals is an appeal of right for purposes of *Douglas v. California*, 372 U.S. 353 (1963), and not a "discretionary" appeal for purposes of *Ross v. Moffitt*, 417 U.S. 600 (1974). The distinction between *Douglas* and *Ross* is between first-tier direct appeals and subsequent appeals and between appeals decided on the merits and appeals that can be denied for any reason. Since an application for leave to appeal to the Michigan Court of Appeals from a plea-based conviction and sentence is a first-tier appeal that is actually decided on the merits, Michigan must provide appellate counsel, just as every other jurisdiction with a first-tier appeal by application has done since *Douglas*.

Even if *Douglas* did not dictate the result, the statute would still be unconstitutional because it deprives indigents of meaningful access to the appellate court. The statute would require indigents to overcome all of the procedural hurdles

necessary to file a first direct appeal. As the Court has specifically recognized in the context of appeals from plea-based convictions, indigent laymen, who may well be functionally illiterate, cannot be expected to overcome those hurdles, nor can they be fairly expected to identify and coherently argue their own appellate issues. The narrow exceptions in the statute would permit the appointment of appellate counsel only in very rare circumstances while denying counsel to indigents with meritorious and complex issues, such as sentencing guidelines challenges and double jeopardy issues. Meanwhile, moneyed defendants would always be assured of meaningful appellate review of sentencing or other errors committed in their cases.

Finally, Respondent Kolenda and *Amicus Curiae* Iowa, et al., have raised a novel waiver issue that is not properly before the Court as it was not raised or decided below. In any event, Michigan cannot require indigents, and only indigents, to waive their constitutional right to the assistance of appellate counsel as a condition of receiving the benefits of a guilty plea, just as Michigan cannot impose such discriminatory waivers on other groups.

ARGUMENT

I. Respondents Fitzgerald and Vogler Have Standing to Challenge the Constitutionality of the Statute Under the Doctrine of *Jus Tertii*.

This case was filed on March 1, 2000, on behalf of five plaintiffs. Three of these plaintiffs, John Tesmer, Charles Carter and Alois Schell, were indigents who had pleaded guilty to felonies and had requested the appointment of appellate counsel. These requests had been denied pursuant to the routine practice of Petitioners Kowalski, Heathscott and Crane. The remaining two plaintiffs, Arthur M. Fitzgerald and Michael D. Vogler, are Michigan attorneys who derive a portion of their income through assigned criminal appeals. Fitzgerald and

Vogler asserted that they had standing under the doctrine of *jus tertii* to challenge the constitutionality of Mich. Comp. Laws §770.3a ("the statute"), which was scheduled to take effect on April 1, 2000. J.A. 17.

Petitioners and their *amici* first contend that Fitzgerald and Vogler lack *jus tertii* standing to challenge the statute. A litigant has standing to assert the constitutional rights of third parties if three requirements are met: (1) "the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute;" (2) "the litigant must have a close relationship to the third party;" and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 629 (1991). All three of these requirements are satisfied here.

A. Fitzgerald and Vogler Have Suffered an "Injury In Fact"

In seeking to raise the constitutional rights of indigents who will be denied the appointment of appellate counsel under the statute, Fitzgerald and Vogler must first establish that they will suffer an actual or imminent injury by operation of that statute. *Friends of the Earth v. Laidlaw Environmental Systems, Inc.*, 528 U.S. 167, 180 (2000); *United States v. Hays*, 515 U.S. 737, 743 (1995). Therefore, Fitzgerald and Vogler alleged in the Complaint that the statute would cause them direct economic loss because it "will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." J.A. 16. Petitioners concede that this allegation of lost income must be accepted as true. Petitioners' Brief at 15 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To understand why the statute would cause Fitzgerald and Vogler to suffer direct economic loss, it is necessary to

consider the process by which appellate counsel are assigned to indigent defendants in Michigan. In 1981, the Michigan Supreme Court established the Michigan Assigned Appellate Counsel System (MAACS) to oversee the appointment of appellate counsel for felony appeals. Mich. Sup. Ct. Admin. Order 1981-7, 412 Mich. lxv (1981). MAACS maintains a statewide list of attorneys who are deemed qualified to accept assigned appeals. *Id.*, 412 Mich. at lxviii. After qualifying for the statewide list of qualified appellate counsel, an attorney places his or her name on a separate roster for each circuit court from which he or she is willing to accepts appeals. A circuit court must appoint attorneys to represent indigents in the order in which the attorneys' names appear on the local roster. Mich. Sup. Ct. Admin. Order 1989-3(4)-(5), 432 Mich. cxxii (1989).

Since the Michigan system for assigning appellate attorneys to indigent defendants operates on a strict rotation, as the number of cases requiring appointed appellate counsel increases, the more often the assignment list will be exhausted and the more often a particular lawyer on that list will receive a paid appointment. The method by which the assigned counsel system operates in Michigan dictates that if the statute were to take effect, a very large proportion of indigent appellants would be removed from the assigned counsel system. Thus, there would be far fewer cases to be assigned, and Fitzgerald and Vogler would earn far less money for representing indigents in assigned appeals.

Petitioners do not deny that the statute would cause Fitzgerald and Vogler to suffer a loss of income, nor can there be any real dispute that such loss of income is the type of concrete "injury in fact" necessary to establish standing. In a long series of cases, the Court has recognized that a party has standing to challenge governmental action that results in economic loss to that party. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236-237 (1990)(motel owners whose business is affected by an adult entertainment ordinance has a "live

controversy"); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n. 3 (1989) (lawyer's interest in fee represents an "injury in fact"); *Craig v. Boren*, 429 U.S. 190, 194 (1976) (bar owner has standing to raise constitutionality of a state statute causing "direct economic injury through the constriction of her buyer's market"); *Singleton v. Wulff*, 428 U.S. 106, 112-113 (1976) (physicians performing abortions have standing to challenge state law limiting abortion funding because "if the physicians prevail in their suit to remove this limitation, they will benefit for they will receive payment for the abortions").

Petitioners and their *amici* further note that the harm necessary to support standing "must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Thus, Petitioners contend that Fitzgerald and Vogler lack standing because their claim of injury involves a future injury. But, as the above analysis of the Michigan assigned appellate counsel system demonstrates, the economic injury that the statute would cause to Fitzgerald and Vogler is neither conjectural nor hypothetical. The number of appellate appointments Fitzgerald and Vogler would receive and, therefore, the amount of money they would earn, *will* be reduced if the statute takes effect.[2]

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[2] *Amici Curiae*, Iowa, *et al.*, attempts to analogize the economic harm to Fitzgerald and Vogler with the conjectural economic loss claimed in *Diamond v. Charles*, 476 U.S. 54 (1986), but the analogy is inapt. In *Diamond*, an Illinois pediatrician sought to defend the constitutionality of a state law restricting abortion by claiming that the law would result in more live births, thereby increasing the pool of potential fee paying clients for his pediatric services. The Court concluded that the possibility that fetuses subject to the Illinois abortion law would survive and ultimately find their way to Dr. Diamond was "unadorned speculation" that would not support standing. *Id.* at 56. In contrast to the speculative claim in *Diamond*, Respondents have established a direct relationship between the operation of the statute and the earnings that Fitzgerald and Vogler would lose in court appointed appeals. Indeed, *Diamond* actually confirms that Fitzgerald and

B. Fitzgerald and Vogler Have a Sufficiently Close Relationship With Indigents Who Will Be Injured by the Statute

The second requirement for *jus tertii* standing is that the litigants have a "close relationship" with the third parties whose rights they seek to assert. *Powers*, 499 U.S. at 411. Before addressing the merits of Petitioners' arguments on the second and third requirements for *jus tertii* standing, this Court must first decide whether Petitioners have waived those arguments.

In the district court and again before the Sixth Circuit, Petitioners argued that Fitzgerald and Vogler could not establish *jus tertii* standing only because they had not sustained a sufficient "injury in fact." Petitioners have substantially modified their position in this Court. They now contend that Fitzgerald and Vogler lack standing because they cannot satisfy any one of the three requirements.

The Court held in *Craig v. Boren* that, although a party's failure to contest the reach of a federal court's authority under Article III would not be binding on the Court, the same was not true with respect to the prudential, judicially-created "rules of self-restraint" governing *jus tertii* standing. 429 U.S. at 193-194. In *Craig*, the parties assumed throughout the litigation that a female vendor of alcohol was a proper party to challenge a statute limiting the sale of beer to young men. Thus, the prudential considerations that normally surface in such a case were never argued in the lower courts in *Craig*. This Court concluded under the circumstances presented in *Craig* that "[t]hese prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here."

Vogler have suffered an "injury in fact" since the Court cited its prior decision in *Singleton* for the principle that "a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice" may assert the rights of his or her patients. *Id.* at 65. Fitzgerald and Vogler have made precisely such a demonstration in this case.

Id. at 193; *see also City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243 (1983).

The Court's reasoning in *Craig* applies equally to this case. In the district court and again before the Sixth Circuit, Petitioners acknowledged the existence of the three-part test for *jus tertii* standing, but Petitioners never denied in either the district court or the court of appeals that Fitzgerald and Vogler had a sufficiently close relationship with indigent criminal defendants to satisfy the second requirement of *jus tertii* standing. Similarly, Petitioners never contested in the courts below Respondents' claim that the third requirement of *jus tertii* standing is satisfied because there are substantial hindrances to the ability of the indigent defendants to assert their own constitutional rights. As in *Craig*, Petitioners' failure to contest the second and third requirements of *jus tertii* standing below should lead this Court to conclude that the prudential concerns that could have been raised in the lower courts "cannot be furthered here."

In any event, Fitzgerald and Volger clearly meet all three prongs of the *jus tertii* test. Petitioners claim that Fitzgerald and Vogler do not possess a "close relationship" to the indigent clients whose rights they seek to assert. However, the Court has held on at least two prior occasions that the attorney-client relationship is sufficiently close to support third party standing. *Caplin & Drysdale*, 491 U.S. at 623 n. 3 (recognizing that the attorney-client relationship "is one of special consequence"); *see also United States Department of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990).

Petitioners and their *amici* maintain, however, that a "close relationship" cannot be found in this case because Fitzgerald and Vogler are asserting the rights of future clients. According to Petitioners, this is significant since a "close relationship" only exists where there is an established relationship between the litigant and the third parties whose

rights he seeks to raise. Both the premise and the substance of this argument are incorrect.

First, Petitioners incorrectly assume that Fitzgerald and Vogler could only assert the rights of future clients. However, Fitzgerald and Vogler are both still taking assigned appeals, including appeals from guilty pleas. Thus, Fitzgerald and Vogler are currently representing individuals who would be directly injured if the statute took effect and forced Fitzgerald and Vogler to withdraw from further representation.[3]

Second, Petitioners are clearly incorrect in claiming that the Court's decisions require an existing relationship between the litigant and the third parties whose rights the litigant seeks to raise. The Court has held in numerous cases that *jus tertii* standing may be premised on prospective relationships between the actual litigant and the individuals whose rights are being asserted. *See, e.g., Pierce v. Society of the Sisters,* 268 U.S. 510, 535 (1925) (schools can challenge state statute on behalf of "present and prospective patrons of their schools"); *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965) (characterizing *Pierce* as allowing school to "assert the rights of potential pupils and their parents"); *Craig v. Boren,* 429 U.S. at 190 (bar owner asserting constitutional rights of her future customers); *Carey v. Population Services*, 431 U.S. 678, 687 (1977) (corporate

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[3]As noted above, Petitioners never contested the "close relationship" requirement of *jus tertii* standing in the district court. If they had, Respondents would have also responded to such an argument with sworn statements from Fitzgerald and Vogler demonstrating that these two attorneys take trial court cases on an assigned basis. Fitzgerald and Vogler would also have been able to confirm that many or most of the indigents whom they represent at the trial court level plead guilty. Thus, had the "close relationship" issue actually been contested in the district court instead of being raised for the first time in this Court, Respondents would have been able to establish that Fitzgerald and Vogler do in fact have existing attorney-client relationships with indigent criminal defendants who would be directly affected by the statute.

distributor of contraceptives has standing to challenge state law limiting sale of its products, "not only in its own right, but also on behalf of its potential customers").

Two of this Court's decisions on the subject of "close relationship" deserve particular attention. In *Triplett*, this Court specifically held that an attorney had *jus tertii* standing to challenge a limitation on the fees that could be charged to a client where that limitation "deprives the lawyer's *prospective* client of a due process right to obtain legal representation." 494 U.S. at 720 (emphasis added). Thus, the Court in *Triplett* expressly approved *jus tertii* standing where the necessary relationship existed between an attorney and that attorney's prospective client. The Court's analysis in *Triplett*, therefore, directly refutes Petitioners' assertion that an established relationship between Respondents and the clients whose rights they seek to assert is a prerequisite for *jus tertii* standing.

Finally, Petitioners' argument on the "close relationship" requirement is inconsistent with *Georgia v. McCollum*, 505 U.S. 42 (1992). In *McCollum*, three whites were charged with assaulting an African-American couple. Prior to trial, the prosecution moved to prohibit the defendants from exercising preemptory challenges in a racially discriminatory manner. The trial court denied the motion and the prosecution appealed on an interlocutory basis. The issue in *McCollum*, therefore, was whether a state prosecutor could object to a defendant's discriminatory exercise of preemptory challenges. To decide this question, the Court had to consider *jus tertii* standing questions similar to those addressed in *Edmonson* and *Powers*, that is, whether the prosecutor had standing to assert the equal protection rights of African-American jurors who might be discriminatorily excluded from serving. The Court concluded in *McCollum* that "[t]he State's relation to potential jurors in this case is closer than the relationships approved in *Powers* and *Edmonson*." 505 U.S. at 56.

What is noteworthy about *McCollum* is that the Court found a sufficiently close relationship between the prosecutors and the veniremen whose rights they wished to assert even though the prosecutors and veniremen had never met. *Cf. Campbell v. Louisiana*, 523 U.S. 392 (1998) (allowing criminal defendant to assert rights of citizens discriminatorily excluded from grand jury). As the Court ultimately concluded in *McCollum*, the second requirement for *jus tertii* could be satisfied by the prosecutor's relationship to "potential jurors." The analysis employed in *McCollum* demonstrates why Petitioners' argument that there must be an existing relationship between Respondents and the clients whose rights they represent must be rejected.

C. Significant Obstacles Prevent Indigent Defendants From Asserting Their Own Rights

The final requirement for *jus tertii* standing is that the third party's ability to assert his own interest must in some way be hindered. As the Sixth Circuit observed, this Court's precedents do not require proof that it would be impossible for the third party to protect his own interest. Pet. App. 12a-13a. All that is required is some hindrance affecting the "likelihood and ability of the third parties . . . to assert their own interests," *Powers*, 499 U.S. at 414, or "practical obstacles [that] prevent a party from asserting rights on behalf of itself." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

In this case, the hindrance that would prevent the indigent defendants from asserting their own rights is directly tied to the constitutional right that the statute would take away from them. If the statute took effect, the indigent defendants would have to litigate their own right to the assistance of appellate counsel in the appellate courts without the assistance of appellate counsel. To accomplish that feat, they would be compelled to navigate on their own the "hopelessly forbidding"

procedural rules governing first-tier direct appeals. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). All of this would have to be done by individuals who are least equipped to advance their claims since, as discussed in Part II(B) of this Argument, *infra*, this Court has repeatedly recognized that a typical indigent defendant is completely incapable of identifying his or her own appellate issues, much less presenting a coherent constitutional argument to an appellate court without ever having had the assistance of appellate counsel. Given this Court's precedents establishing the necessity of appellate counsel for a first direct appeal, there should be no question that a statute requiring indigent criminal defendants to proceed *pro se* on a first appeal provides exactly the type of hindrance that would satisfy the third requirement of *jus tertii* standing.[4]

Petitioners attack the Sixth Circuit's analysis of the third requirement for *jus tertii* standing by arguing that it improperly conflated the issues of standing and the merits of Respondents' constitutional claim. This criticism misses the mark.

The Sixth Circuit did not confuse the merits of this case and *jus tertii* standing. The merits of this case involve the question of whether indigents who plead guilty in Michigan

[4]One of the dissenting opinions in the Sixth Circuit reasoned that there was no hindrance to an indigent raising these constitutional questions *pro se* because the indigent defendant in *Bulger* had supposedly taken his claim for appointed appellate counsel through the entire Michigan appellate system and even petitioned this Court for review. J.A. 48. The dissent apparently overlooked the fact that Bulger was represented by an attorney who had been specially appointed by the Michigan Supreme Court solely to litigate the question of whether Bulger had a constitutional right to appointed appellate counsel for his underlying appeal. *See Bulger, et al. v. Judges of Tenth Circuit Court*, 562 N.W.2d 200 (Mich. 1997) (ordering counsel be appointed for Bulger and other indigents to assist them in their challenge to denial of appellate counsel). In other words, even the Michigan Supreme Court, which ultimately ruled that Bulger was not entitled to appellate counsel, recognized that he could not reasonably be expected to litigate *pro se* his constitutional entitlement to appellate counsel.

courts have a constitutional right to appointed appellate counsel. Whether such a constitutional right exists, the fact remains that an indigent who seeks to challenge the constitutionality of the statute must do so without the benefit of counsel. It is the fact that an indigent will be forced to litigate this constitutional question without the assistance of counsel that is relevant for purposes of the hindrance requirement, not whether the indigent has a constitutional right to the assistance of counsel.[5]

D. *Jus Tertii* Standing Is Appropriate In This Case

Respondents Fitzgerald and Vogler have satisfied all three requirements for *jus tertii* standing. In addition to these requirements, Petitioners and their *amici* have argued two other points which merit a response. First, Petitioners suggest that this Court should be particularly hesitant to recognize a claim of *jus tertii* standing made on behalf of an attorney because such standing creates the prospect of innumerable constitutional challenges being advanced by attorneys. Petitioners are, in essence, claiming that special principles of *jus tertii* standing should apply where the party asserting the rights of third parties is an attorney. However, this Court's decisions in *Caplin & Drysdale* and *Triplett* demonstrate that attorneys are subject to the same three-part test of *jus tertii* standing that applies in every other case.

In any event, cases in which attorneys would be able to satisfy the third requirement for *jus tertii* standing on behalf of criminal defendants will remain rare. For most statutes adversely affecting criminal defendants, the criminal defendants would be able to bring their own challenges aided, of course, by

[5]In any event, this Court has recognized that there is a class of cases "where standing and the merits are inextricably intertwined." *City of Revere*, 463 U.S. at 243, n. 5. Thus, even if the Sixth Circuit could be accused of mixing the requirements of *jus tertii* standing with the merits of the constitutional issue, it would not have been error to do so since standing and the merits are intertwined in this litigation.

their attorneys. What makes this case unusual is that the statute being challenged deprives the indigent criminal defendants of the essential tool they would need to challenge the statute on their own.

Second, Petitioners and their *amici* make much of the fact that the three individuals who pleaded guilty and joined this case as plaintiffs were dismissed on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). Petitioners and their *amici* assert that there is an incongruity in dismissing the constitutional claims of the Respondent indigent defendants under *Younger* while allowing those of the Respondent attorneys to proceed.

This argument fails in several respects. First, Petitioners overlook the fact that this case encompasses two distinct constitutional challenges. Prior to the passage of the statute, Tesmer, Carter and Schnell were denied the assistance of appellate counsel pursuant to the Petitioners' pre-statutory practices. These three indigent defendants joined this case to challenge that denial. These three indigents could not challenge the constitutionality of the statute since they had suffered no injury as a result of the statute, which did not even exist when they were denied counsel. *See Lujan*, 504 U.S. at 561 (standing requires a "causal connection between the injury and the conduct complained of"). Therefore, only Fitzgerald and Vogler challenged the constitutionality of the statute. Since the five original plaintiffs were raising two distinct constitutional challenges, there is nothing incongruous in the fact that Fitzgerald's and Vogler's challenge to the statute survived the dismissal of the indigents' challenge to the Petitioners' pre-statutory practice of denying counsel.

Second, it is clear from *Wooley v. Maynard*, 430 U.S. 705, 711 (1977), and *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), that Fitzgerald's and Vogler's claim for prospective declaratory relief could not have been subject to *Younger* abstention since they had no cases pending in state court. Since

these claims would not have been subject to *Younger* if brought on their own, these claims cannot be subject to *Younger* merely because they happened to be joined with other claims that were subject to abstention.

Finally, it should be observed that if Fitzgerald and Vogler (or other similarly situated attorneys) could not bring this challenge to the statute, the same impediments that prevent indigent defendants from litigating their constitutional right to appellate counsel *pro se* would allow Michigan to deprive thousands of indigents of their constitutional rights every year without any realistic prospect of decisive federal review. Since the federal courts would abstain from hearing the challenge of any individual indigent denied appellate counsel, an indigent seeking to litigate the issue in federal court would first have to coherently litigate the constitutional issue all the way through the Michigan appellate courts without the assistance of counsel. *See generally O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (requiring habeas petitioner to exhaust constitutional issues to state supreme court); *see also Baldwin v. Reese*, ___ U.S. ___, 124 S.Ct. 1347 (2004) (requiring habeas petitioner to have adequately identified federal issue in appeal to state supreme court). Since, as this Court specifically recognized in *Evitts*, 469 U.S. at 396, a typical indigent criminal defendant will be completely incapable of even coping with the procedural requirements of filing a first appeal, much less adequately raising, identifying, and preserving a constitutional issue all the way through a state appellate system, there is virtually no chance that a typical indigent could successfully exhaust the issue in state court. And, of course, the indigent could not win in state court since the Michigan Supreme Court has already held that Michigan may constitutionally deny appellate counsel.

Even if a *pro se* indigent defendant were somehow able to properly litigate the constitutional issue all the way through the state courts, he or she still could not prevail on habeas corpus unless the federal court concluded that the decision of

the Michigan courts denying appellate counsel is "contrary to, or involved an unreasonable application of," the decisions of this Court. 28 U.S.C. § 2254 (d)(1). Since the Sixth Circuit has already concluded that this Court "has yet to address the situation the statute presents," Pet. App. 20a, a district court presumably could not find that a state court decision upholding the statute would meet the standard for habeas corpus relief.

However, even if some intrepid *pro se* indigent defendant were able to exhaust the constitutional issue all the way through the state courts and persuade a federal district judge to grant habeas relief, *that relief would not apply to any other indigents*. That is, even if a district judge were to grant habeas relief, so long as Michigan chose not to appeal the habeas grant all the way to this Court, there would be no decision binding the Michigan state courts. On the contrary, the habeas grant would require Michigan to provide relief only to that one habeas petitioner, while the Michigan state courts would continue to be bound by *Bulger* and the statute to continue denying appellate counsel to all other similarly situated indigents.

Finally, even if the hypothetical *pro se* indigent somehow managed to exhaust the constitutional issue through the state courts and somehow managed to get the merits of the issue before this Court (on direct appeal or through habeas), that process would inevitably take many years during which thousands or tens of thousands of other indigents would suffer the irreparable constitutional injury of being denied appellate counsel for their one and only direct appeal on the merits. In short, if attorneys such as Fitzgerald and Vogler cannot challenge this statute in federal court, the practically insurmountable barriers that indigent criminal defendants would face in trying to obtain federal relief would mean that Michigan could deny a fundamental constitutional right to more than half of its criminal defendants for years, or even forever, without any realistic prospect of federal judicial intervention.

II. The Denial of Appointed Counsel to Indigent Defendants Filing Their Initial Direct Appeals on the Merits After Pleading Guilty or *Nolo Contendere* Violates the Fourteenth Amendment.

As Petitioners acknowledge, *Douglas v. California*, 272 U.S. 353 (1963), stands for the proposition that "if a State grants a right to a first appeal on the merits, then it generally cannot deny appointed counsel to an indigent." Petitioners' Brief at 27. The Michigan statute at issue in this litigation, however, would do precisely that. The Michigan Constitution grants a right for those who plead guilty to file an application for leave to appeal to the Michigan Court of Appeals, which decides all such properly filed applications on the merits, but the statute would deny the assistance of counsel to the vast majority of indigents who wish to pursue that appeal.

Petitioners cannot cite a single post-*Douglas* case from any American jurisdiction, other than the Michigan Supreme Court's decision in *Bulger*, holding that counsel may be denied for a first direct appeal from a felony conviction. In fact, every state currently appoints counsel for indigents filing first direct appeals from felony convictions even if the convictions were obtained by plea and even if the appeals are by leave of the appellate court. *See* n. 6, *infra.*

The statute is unconstitutional for two reasons. First, an appeal to the Michigan Court of Appeals from a plea-based conviction is not "discretionary" as the Court defined that term in *Douglas*, *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Evitts v. Lucey*, 469 U.S. 387 (1985). A discretionary appeal for purposes of the Fourteenth Amendment is a second-tier appeal in which the appellate court's refusal to hear the appeal does not amount to a decision on the merits, while an application for leave to appeal from a plea-based felony conviction in Michigan is a first-tier appeal that the Michigan Court of Appeals actually decides on the merits. Therefore, *Douglas* requires that counsel

be appointed.

Second, even if the appeal to the Michigan Court of Appeals were regarded as "discretionary," an indigent denied counsel under the statute would not enjoy the "meaningful access" to the appellate system required by *Ross*. Unlike the indigents in *Ross*, a Michigan indigent denied counsel under the statute has not had any prior assistance of appellate counsel, has not had an attorney's assistance in identifying potentially meritorious appellate issues, does not have an appellate brief to use as a model, and does not even have a transcript unless he can figure out how to order one. As the Court has repeatedly recognized in appeals from plea-based convictions, an indigent on a first-tier appeal cannot be expected to even identify his own appellate issues, much less overcome the procedural obstacles necessary to perfect such an appeal.

A. An Application for Leave to Appeal to the Michigan Court of Appeals from a Plea-Based Felony Conviction Is Not a "Discretionary" Appeal Within the Meaning of *Douglas* and *Ross*.

1. "Discretionary" Appeals Do Not Include First-Tier Direct Appeals Decided on the Merits.

The Court held in *Douglas* that the Fourteenth Amendment requires states to appoint counsel for an indigent's first appeal from a felony conviction because "a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." 372 U.S. at 355; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (recognizing "the Court's decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns").

An indigent defendant forced to represent himself on his first appeal has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. The Court carefully distinguished the "first appeal" at issue in

Douglas from subsequent discretionary appeals:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review *beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court*. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike from a criminal conviction. We need not decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court *after the District Court of Appeal had sustained his conviction* . . . .

Id. at 356 (emphasis added; citations omitted).

By using the phrase "of right" in *Douglas*, the Court distinguished a first direct appeal from subsequent discretionary appeals. The Court did not need to elaborate because, like the California system at issue in *Douglas*, almost all first appeals from criminal convictions in the United States are labeled "of right." As of 1987, 47 of the 50 states and the federal government provided automatic appeals of right from felony convictions. *See Bundy v. Wilson*, 815 F.2d 125, 136-142 (1st Cir. 1987) (describing criminal appellate systems for all American jurisdictions).[6]

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[6] Since criminal defendants in New Hampshire now have an automatic right of appeal to the New Hampshire Supreme Court, *see* N.H. S.Ct. R. 4, 7, Virginia and West Virginia are apparently the only two states in which first-tier criminal appeals are generally by application or petition. Certain types of first-tier felony appeals are by application or petition in at least five other states. *See* Me. R. App. P. 20 (sentencing appeals); Md. Code Ann. § 12-1302(e) (appeals from plea-based convictions); N.Y. Crim.

Eleven years after *Douglas*, the Court in *Ross* addressed the issue *Douglas* left open: whether the right to counsel extended to a second-tier, discretionary appeal to a state supreme court. The second-tier appeal at issue in *Ross* was truly "discretionary" since the North Carolina Supreme Court heard an appeal from the North Carolina Court of Appeals only if the case had significant public interest or major significance to the jurisprudence of the state or identified a conflict with a decision of the state supreme court. *Ross*, 417 U.S. at 614.

The Court in *Ross* held that the Fourteenth Amendment did not require the appointment of counsel for such a second-tier appeal. *Id.* at 610-616. In reaching this conclusion, the Court relied on two factors. First, appointment of appellate counsel was not essential because the defendant had already received the benefit of appellate counsel in his first appeal to the state court of appeals:

> Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court.

Id. at 614-615 (quoting *Douglas* at 356).

Proc. L. §§ 450.10(1), 450.15 (certain sentencing appeals from plea-based convictions); N.C. Gen. Stat. § 15A-1444(e) (certain appeals from plea-based convictions); Okla. Stat. Tit. 22 § 1051(a) (appeals from plea-based convictions). In all seven of these states, appellate counsel is automatically provided to indigents to assist them with filing such applications or petitions. *See* Me. R. Crim. P. 44(a)(2); Md. Ann. Code, art 27A § 4; N.Y. County Law § 717(1); N.C. Gen. Stat. § 7A-451; Okla. Stat. Tit. 22 § 1356; Va. Code § 19.2-163.3; W.Va. R. Crim. P. 44(a).

Second, the Court heavily relied on the fact that the North Carolina Supreme Court's decision to grant review was truly "discretionary," that is, not dependent on "whether there has been a correct adjudication of guilt in every individual case." *Id.* at 615 (internal quotation marks and citation omitted). Instead, *Ross* recognized that discretionary review at the second tier is designed only to identify important cases: "Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review." *Id.*

The Court summarized these two points: "both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*." *Id.* at 616.

The entire rationale of *Ross* collapses when applied to any *first* appeal that is decided on the *merits*, regardless of whether that first appeal is automatic or by application for leave to appeal. This conclusion is dictated both by a fair reading of *Douglas* and *Ross* as well as by numerous decisions of the Court subsequent to *Douglas* and *Ross*.

The Court has repeatedly confirmed that the holding in *Ross* is limited to second-tier or collateral appeals. In *United States v. MacCollom*, 426 U.S. 317, 324 (1976), the plurality explained that "in [*Ross*], we declined to extend [*Douglas*] to a discretionary second appeal from an intermediate appellate court to the Supreme Court of North Carolina." In *Murray v. Giarratano*, 492 U.S. 1, 9 (1989), the Court cited *Douglas* for the proposition that an indigent is "entitled as a matter of right

to counsel for an initial appeal from the judgment and sentence of the trial court," while *Ross* established that the right to counsel at the trial and initial appeal stages "did not carry over to a discretionary appeal provided by North Carolina law from the intermediate appellate court to the Supreme Court of North Carolina."

The Court's clearest statement of the distinction between *Douglas* and *Ross* is found in *Evitts v. Lucey*, 469 U.S. 387 (1985). In response to a Kentucky criminal defendant's claim that he had received ineffective assistance of appellate counsel, the warden argued on the basis of *Ross* that there was no right to counsel in the Kentucky Court of Appeals since such an appeal is "conditional." The Court rejected this argument because the "discretionary appeal" discussed in *Ross* did not refer to a first direct appeal decided on the merits:

> Unlike the appellant in the discretionary appeal in Ross, a criminal appellant in the Kentucky Court of Appeals typically has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion. In addition, petitioners fail to point to any source of Kentucky law indicating that a decision on the merits in an appeal like that of respondent--unlike the discretionary appeal in *Ross*--is contingent on a discretionary finding by the Court of Appeals that the case involves significant public or jurisprudential issues; the purpose of a first appeal in the Kentucky court system appears to be precisely to determine whether the individual defendant has been lawfully convicted. In short, a criminal defendant bringing an appeal to the Kentucky Court of Appeals has not previously had an adequate opportunity to present his claims fairly

> in the context of the State's appellate process. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in [*Douglas*].

Evitts, 469 U.S. at 402 (citations and quotation marks omitted).

Six years after *Evitts*, the Court again made it clear in *Coleman v. Thompson*, 501 U.S. 722 (1991), that the *Douglas* right to counsel attaches to an initial criminal appeal, even if that first appeal is by application for leave to appeal. *Coleman* involved a habeas corpus petition challenging a Virginia conviction. Notwithstanding the fact that the first appeal in Virginia is by application, the Virginia Supreme Court had long held that *Douglas* required the appointment of counsel. *See Cabaniss v. Cunningham*, 143 S.E.2d 911, 913-914 (Va. 1965). In *Coleman*, the Court explicitly approved that conclusion: Cabaniss had defaulted the direct appeal of his criminal conviction because the trial court had failed to honor his request for appointed counsel on appeal, a request the court was required to honor under the Constitution. *See Douglas v. California*, 372 U.S. 353 (1963)." *Coleman*, 501 U.S. at 742 (internal citation omitted).

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court upheld a California rule allowing an indigent's appellate counsel to file an "*Anders* brief" that does not specify any potential appellate issues. In arriving at this conclusion, the Court revisited its pre-*Douglas* decision in *Ellis v. United States*, 356 U.S. 674 (1958). *Smith*, 528 U.S. at 270-271, 278-281. Under the federal rules in effect at the time *Ellis* was decided, an indigent convicted in federal district court who wished to appeal had to file an "application for leave to appeal in forma pauperis" in the court of appeals. *Ellis*, 356 U.S. at 674. In *Ellis*, the Court peremptorily reversed the court of appeals' refusal to appoint counsel before denying the indigent's application for

leave to appeal, observing: "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." *Id.* at 675.

Since *Ellis* was decided before *Douglas,* the rule announced in *Ellis* was not based on the Fourteenth Amendment. However, in *Smith*, the Court indicated that the constitutional rule announced in *Douglas* would have dictated the result reached in *Ellis*:

> Although we did not, in *Anders*, explain in detail why the [former] California procedure was inadequate under each of these precedents, our particularly heavy reliance on *Ellis* makes clear that a significant factor was that the old California procedure did not require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail on appeal. *Compare Anders, supra*, at 741-742 ("If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw. If the court agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.") quoting *Ellis*, *supra*, at 675)).

Smith, 528 U.S. at 279 (internal ellipses and quotation marks omitted).

The *Smith* Court also cited *Ellis* in support of the following statement: "Although an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 279, n. 10 (citing *Ellis*, 356 U.S. at 675;

additional citation omitted). Thus, the Court in *Smith* regarded the *Ellis* requirement that counsel be appointed to evaluate the case before an indigent's first application for leave to appeal as part of the constitutional minimum dictated by *Douglas*.

Given these decisions from the Court, it is not surprising that, with the single exception of the Michigan Supreme Court's decision in *Bulger*, no state or federal appellate court since *Douglas* has ever held that an indigent may be denied the assistance of appellate counsel for a first direct felony appeal, even if that first appeal is by leave and even if it follows a plea-based conviction. The relatively few courts to reach the question had uniformly held until *Bulger* that counsel must be appointed for first-tier applications for leave to appeal. *See, e.g., Cabaniss*, 143 S.E.2d at 913-914 (holding that counsel must be appointed for first-tier petition to appeal to Virginia appellate court); *State v. Trowell*, 739 So.2d 77, 80-81 (Fla. 1999) (*Douglas* guarantees counsel for petition to appeal from guilty plea); *Perez v. State*, 4 S.W.3d 305, 307 (Tex. Ct. App. 1999) (same); *see also Bundy*, 815 F.2d at130 (concluding that *Douglas*, not *Ross*, governs first-tier petition to appeal to New Hampshire Supreme Court).

2. The Appeal At Issue in This Case Is Not "Discretionary."

It is clear from *Douglas*, *Ross*, and all of the authority interpreting and applying those two cases that an application for leave to appeal to the Michigan Court of Appeals, like the application for leave to appeal in *Ellis*, is an appeal for which counsel must be provided. An application for leave to appeal to the Michigan Court of Appeals is a *first appeal*; that is, the defendant does not already have "a brief on the merits of the appeal, or a previous written opinion" and "has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Evitts*, 469 U.S. at 402.

Further, the purpose of that appeal to the Michigan Court of Appeals is precisely to determine whether the individual defendant has been lawfully convicted and sentenced. *Id.* Thus, the Michigan Court of Appeals, like the Virginia appellate courts discussed in *Coleman*, actually makes a decision on the *merits* of a properly filed application for leave to appeal. *Cf. Jackson v. Virginia*, 443 U.S. 307, 311 n. 4 (1979) ("Each petition for writ of error under Va.Code § 19.2-317 (1975) is reviewed on the merits ... and the effect of a denial is to affirm the judgment of conviction on the merits"). Therefore, the Michigan Court of Appeals' standard order denying leave to appeal from a plea-based conviction invariably reads, "The Court orders that the application for leave to appeal is DENIED *for lack of merit in the grounds presented.*" J.A. 22a-27a (emphasis added).

Despite Petitioners' claim to the contrary, the Michigan Court of Appeals has held many times that such an order is a conclusive determination of the merits that precludes relitigation under the law of the case doctrine. *See, e.g., People v. Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984) ("another panel of this Court denied defendant's motion to remand on this same issue 'for lack of merit in the grounds presented.' Therefore, we are precluded from reaching the merits of this issue by the law of the case doctrine."); *see also People v. Douglas*, 332 N.W.2d 521, 523 (Mich. Ct. App. 1983) (same); *People v. Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App. 1981) (same). The Michigan Court of Appeals continues today to routinely hold that an order denying leave to appeal "for lack of merit in the grounds presented" is a decision on the merits and therefore subject to the law of the case doctrine. *See, e.g., Contineri v. Clark*, 2003 WL 21771236 (Mich. Ct. App. 2003) (holding that since order denying previous application for leave to appeal "for lack of merit in the grounds presented" "did, in fact, express an opinion on the merits," law of the case doctrine applied); *see also People v. Weathers*, 2003 WL 21362810 (Mich. Ct. App. 2003); *Sabaugh v. Riga*, 2003 WL 21362981 (Mich. Ct. App. 2003); *DiCicco v. City of Grosse Poine Woods*, 2002 WL 346126 (Mich. Ct. App. 2002).

Petitioners cite three old cases, *Great Lakes Realty Corp. v. Peters*, 57 N.W.2d 901 (Mich. 1953), *People v. Berry*, 157 N.W.2d 310 (Mich. Ct. App. 1968), and *State v. Bobenal Investment*, 314 N.W.2d 512 (Mich. Ct. App. 1981), supposedly in support of the claim that an order denying an application for lack of merit is not a decision on the merits. Petitioners' Brief at 40-42. However, none of these cases even arguably stands for that proposition; indeed, the phrase "lack of merit in the grounds presented" never appears in any of these cases. In *Peters*, 57 N.W.2d at 903, the Michigan Supreme Court simply observed that its standard order denying an application for leave to appeal, which never expresses an opinion on the merits, does not amount to an affirmance. In *Berry*, 157 N.W.2d at 311-312, and *Bobenal*, 314 N.W.2d at 514 n. 2, the Michigan Court of Appeals simply refused to apply the law of the case doctrine without ever stating whether the prior applications had been denied for lack of merit or for some other reason. In any event, as the cases cited above demonstrate, it is indisputable that the Michigan Court of Appeals now routinely treats its standard orders denying leave to appeal for "lack of merit in the grounds presented" as decisions on the merits.

By using the term "discretionary" to describe an application to the Michigan Court of Appeals, Petitioners are attempting to have their cake and eat it too. By calling the appeal "discretionary," Petitioners hope to avoid appointing appellate counsel to indigents, but by having such appeals decided on the merits, Petitioners receive the substantial benefit of barring those indigents from ever relitigating the issues presented in those *pro se* appeals.

In reality, the system that Michigan has set up for appellate review of plea-based convictions and sentences is

simply an example of the type of expedited or screened first-tier appeals found in several other states. *See, e.g.*, Nev. R. App. P. 3C (creating "fast track" appellate system for certain types of first-tier criminal appeals); Va. Code § 17.1-406(A) (providing first-tier appeal by petition for leave to appeal). Criminal defendants in such systems have the right to file such an appeal, the appeals are decided on the merits, and counsel is automatically appointed for indigents. *See* Nev. Rev. Stat. § 178.397 (requiring appointment of counsel for indigents on first-tier appeal); Va. Code § 19.2-163.3 (same).

In short, an application for leave to appeal to the Michigan Court of Appeals is not a discretionary appeal. It is a first-tier direct appeal, criminal defendants have a state constitutional right to file such an appeal, and the appeal is decided on the merits. Therefore, like every other first-tier direct appeal from a felony conviction in the United States, it is an appeal for which counsel must be provided under *Douglas*.

B. Indigent Defendants Forced to File Applications for Leave to Appeal Without Counsel Will Receive a "Meaningless Ritual" Instead of Meaningful Appellate Review.

Even if *Ross*, rather than *Douglas*, governed an application for leave to appeal to the Michigan Court of Appeals, the denial of appellate counsel to indigent defendants would violate the Fourteenth Amendment. An indigent forced to proceed without counsel has "only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas*, 372 U.S. at 358. Therefore, even those few states that have truly "discretionary" first appeals uniformly provide appellate counsel. *See, e.g., Rhodes v. Leverett*, 239 S.E.2d 136, 140 (W.Va. 1977) (state constitution guarantees counsel for discretionary first-tier petition to appeal); *State v. Cooper*, 498 A.2d 1209, 1213 (N.H. 1985) (state constitution and statutes guarantee counsel for former discretionary first-tier petition to

appeal); *cf. Bundy*, 815 F.2d at 130 (concluding *Douglas* governs former first-tier discretionary appeal in New Hampshire).

Petitioners make essentially three arguments, however, as to why Michigan indigents will receive meaningful access to the Michigan Court of Appeals when they attempt to appeal sentencing and other errors after their plea-based convictions. First, they claim that appeals from plea-based convictions are relatively simple. Second, they argue that the indigent may use his or her trial counsel's work product to write an application for leave to appeal. Third, they point out that the statute does permit the appointment of counsel in several situations. Respondents shall address each of these arguments in turn.

1. A Typical Indigent Cannot Identify or Coherently Argue Appellate Issues Arising From His Plea-Based Appeal or Overcome the Procedural Hurdles Arising in a First-Tier Appeal.

First, the most obvious objection to the argument that *Douglas* should not apply to plea-based convictions is that it finds no support in *Douglas* or in any of the Court's other cases. To the contrary, the Court has consistently recognized that a typical indigent is completely incapable of identifying and raising any kind of issue in a first direct appeal, no matter how simple it might be, without the assistance of counsel. In *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000), the Court specifically recognized, *in an appeal from a guilty plea*, "It is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal."

A guilty plea limits the number of potential appellate issues, but many potential appellate issues of all levels of complexity remain. After pleading guilty, Michigan defendants retain the right to challenge dozens of different types of

sentencing errors, *see* pp. 39-40, *infra,* including Double Jeopardy Clause violations, improper imposition of consecutive sentences, excessive or improper restitution and forfeiture orders, erroneous denials of credit for prior incarceration, breaches of plea bargains at sentencing, denials of allocution, and violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In 1999, the Michigan Legislature enacted a sentencing guideline scheme that rivals its federal counterpart in complexity. *See* Mich. Comp. Laws § 777.1, *et seq.* However, the statute provides that a trial judge "may," but is not required to, appoint appellate counsel for an indigent who has preserved an outcome-determinative challenge to the judge's own scoring of the sentencing guidelines. In other words, the statute would require most indigents to litigate *pro se* complex sentencing guidelines questions, many of which would be questions of first impression in Michigan.

As the Court specifically recognized in *Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his meritorious appellate issues, much less capable of arguing them coherently so that the Michigan Court of Appeals can decide whether to review them. *See also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000) (recognizing that even if counsel is ineffective, "it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself").

The difficulties a typical indigent defendant would face are illustrated by the handwritten declaration of Respondent Charles Carter, who wrote: "I have not filed an appeal because I cannot afford a lawyer. I do not know how to represent myself. I don't know the law and I don't have any one to help me. I made it to the10th grade, I had special ed reading class. My family can not hire a lawyer for me. I was sentence to Life for atemted murder [sic]." J.A. 28. The statute would require

thousands of persons like Mr. Carter to identify and argue their own appellate issues every year. Compounding the problem still further, approximately 70% of all inmates in the United States are functionally illiterate, *see* U.S. Dep't of Educ., *Literacy Behind Prison Walls*, NCED 1994-102 at 10, 17.

Petitioners' argument that plea appeals are relatively simple also completely ignores the *procedural* hurdles that indigents such as Mr. Carter must overcome in order to even have their applications considered by the appellate court. As the Court put it in *Evitts*, 469 U.S. at 396, "To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake."

The Michigan Supreme Court has provided an excellent example of the "hopelessly forbidding" procedural hurdles indigent plea defendants would face if this Court upholds the statute. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the court refused to hear an appeal from an indigent plea defendant whose request for appellate counsel had been denied and whose application for leave to appeal to the Michigan Court of Appeals had been denied after he had been unable to obtain his sentencing transcript. In a concurrence to that denial, the author of the *Bulger* opinion explained "defendant never raised the issue of his failure to receive the sentencing transcript. . . . Defendant had an opportunity to direct the attention of the Court of Appeals to his troubles in obtaining a copy of the sentencing transcript, but he failed to do so." *Id.* (Corrigan, C.J., concurring). In other words, because the defendant, who was forced to proceed *pro se*, failed to also raise in his appeal the fact that he had been wrongfully denied his sentencing transcript, he waived his right to appellate review of his sentence.

Plaza is illustrative of the point from *Evitts* that the appellate procedure involved in any first direct appeal is "hopelessly forbidding" for laymen. To perfect an appeal, an indigent who may well be illiterate, mentally ill, or retarded--and is certainly unschooled in the intricacies of the law--must figure out from a long and complicated set of instructions, *see* Pet. App. 160a-164a, how to obtain his or her "register of actions," his or her transcripts, the presentence information report, his or her prisoner account statement, and the judgment of sentence. Then he or she must make the requisite number of copies of all of these documents, which must be served and filed (with proof of service), along with a motion to waive fees, an affidavit of indigency, and the application for leave to appeal itself. The application for leave to appeal itself requires the indigent to fill out another long and complicated form, *see* Pet. App. 165a-169a, on which he or she is supposed to identify and argue his or her own appellate issues in the tiny spaces provided (or attach additional pages), and identify the controlling legal authorities that support his or her arguments.

If the indigent fails to overcome any one of these numerous procedural hurdles, he or she can expect to have the application denied without consideration of the issues, as occurred in *Plaza*. These obstacles are far greater than those faced by the indigents in *Ross*, who already had the benefit of transcripts, appellate court opinions, and, most critically, their lawyers' briefs from their first-tier appeals identifying and arguing their appellate issues. Therefore, Petitioners are mistaken in their claim that indigents can receive meaningful access to appellate review simply because the appeal is from a plea-based conviction.

2. Indigents Cannot Rely on Trial Counsel's Work Product to Perfect First-Tier Direct Appeals.

Petitioners' second argument, that an indigent should be able to make do with trial counsel's work product, is both

misleading and directly contrary to the Court's precedents. The argument is misleading because there is almost always no written work product of trial counsel for the indigent to use. Petitioner points to Michigan court rules requiring trial counsel to file motions to withdraw pleas in writing, Petitioners' Brief at 35-36, but, as Respondent Kolenda correctly points out, the overwhelming majority of plea appeals involve *sentencing* issues, not plea withdrawal issues. Kolenda Brief at 21; *see also* Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438 (1996) (discussing Michigan State Bar Report that found "a significant majority of guilty plea appeals involve only sentencing issues"). Unlike plea withdrawal, there is no requirement in Michigan law that trial counsel must object in writing to guidelines scoring, jail credit, consecutive sentencing, consideration of prior convictions, restitution orders, *Apprendi* violations, double jeopardy issues, or any other sentencing issues. Such objections, if trial counsel makes them at all, are almost invariably made orally at the sentencing hearing at the time the particular issue first arises.

Even if trial counsel actually files a written motion, Petitioners' claim that such a motion is an adequate substitute for appellate counsel is directly contrary to *Swenson v. Bosler*, 386 U.S. 258 (1967). In *Swenson*, the Court unanimously held that a pre-*Douglas* Missouri system requiring indigents to rely on trial court motions to file *pro se* appellate briefs violated the Fourteenth Amendment. *Id.* at 259. Appellate counsel need not be provided for a *second-tier* appeal because the indigent has already received *appellate* counsel's work product, but the same reasoning does not apply to the use of trial counsel's work product on a first-tier appeal. *See Ross*, 417 U.S. at 614 (stressing that Respondent received meaningful access to state supreme court because his claims had "once been presented by a lawyer and passed upon by an *appellate* court") (emphasis added; quoting *Douglas*); *see also Evitts*, 469 U.S. at 402

(recognizing that second-tier appellant has benefit of "previous appellate brief"); *Swenson*, 386 U.S. at 259 (recognizing "substantial benefit" in "assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims or error are based and which designates and interprets the relevant portions of the trial transcript").

3. The Statutory Exceptions Are Insufficient to Provide Indigents Meaningful Access to the Michigan Court of Appeals.

Finally, Petitioners' claim that the exceptions in the statute render it constitutional cannot withstand any scrutiny. The statute requires the appointment of counsel in only four circumstances: (1) to defend a prosecutor's appeal; (2) if the sentence amounts to an upward departure from the sentencing guidelines range; (3) if the Michigan Court of Appeals grants the indigent's application for leave to appeal; or (4) if the plea was conditional. Pet. App. 140a.

The first and third exceptions, by definition, do not apply to the indigent defendant who needs the assistance of appellate counsel to file an application for leave to appeal to the Michigan Court of Appeals. The third exception simply means that if the indigent is somehow able to file an application for leave to appeal on his or her own that miraculously identifies and coherently argues a potentially meritorious issue so that the Michigan Court of Appeals grants the application, the Michigan Court of Appeals will then finally provide counsel. In other words, the vast majority of indigents who cannot identify and raise their own issues in a meaningful way will never get to the point where the third exception could possibly apply.

The fourth exception, for conditional pleas, is also useless to the vast majority of indigents who need the assistance of counsel. First, there is no right in Michigan to enter a conditional plea, and such pleas are very rare in Michigan

because they require the consent of both the judge and the prosecutor. *See* Mich. Ct. R. 6.301(C)(2) (providing that a defendant may enter a conditional plea "only with the consent of the court and the prosecutor"); Pet. App. 145a. Second, a defendant can enter a conditional plea only to challenge "pretrial rulings." *Id.* But most appeals after guilty pleas concern sentencing issues. *See* Matuszak, *supra*, at 438. In other words, the possibility of a conditional plea is of no use at all to a typical indigent plea defendant whose complaint arises not from a pretrial ruling but from the sentence he or she received after the plea has been entered and accepted.

The only other statutory exception is for indigents who receive an upward departure from the sentencing guidelines. While such indigents need the assistance of appellate counsel, the problem is that they are not the only ones who may have meritorious appellate issues. Indeed, the statute would allow a trial judge to deny appellate counsel to an indigent who receives a sentence that would have been an upward departure if the trial judge had scored the guidelines correctly, even when the indigent has preserved his challenge to the trial judge's scoring.

For all other types of appellate issues, no matter how meritorious or complex, the statute flatly forbids the judge from appointing appellate counsel. Therefore, an indigent would have to litigate *pro se* all other potentially meritorious appellate claims, including arguments that: (1) the sentence should have been concurrent instead of consecutive, *see, e.g. People v. Hunter*, 507 N.W.2d 768 (Mich. Ct. App. 1993); (2) the judge failed to award proper jail credit, *see, e.g., People v. Resler*, 532 N.W.2d 907 (Mich. Ct. App. 1995); (3) the prosecutor and/or judge breached a plea and/or sentencing agreement, *see, e.g., People v. Nixten*, 454 N.W.2d 160 (Mich. Ct. App.1990); (4) the plea bargain was illusory, *see, e.g., People v. Graves*, 523 N.W.2d 876 (Mich. Ct. App. 1994); (5) the judge erred in ordering restitution that the defendant cannot pay; *see, e.g., People v. Orweller*, 494 N.W.2d 753 (Mich. Ct. App. 1992); or

(6) the convictions and/or sentences violate the Double Jeopardy Clause, *see, e.g., People v. Artman*, 553 N.W.2d 673 (Mich. Ct. App. 1998).

Many of the indigents who will be unable to file their own appeals will have meritorious grounds for appeal and will therefore be denied any chance of obtaining the relief to which they would be entitled. *See* Matuszak, *supra*, at 443 (discussing studies showing 12% to 47% of Michigan guilty plea appeals resulted in relief to defendants). By contrast, a Michigan plea defendant who can afford an attorney will always be able to obtain meaningful appellate review of such errors.

In many cases, the indigent defendant will be completely unaware of meritorious grounds for appeal because trial counsel will have overlooked the error. *See Coppedge v. United States*, 369 U.S. 438, 449-450 (1962) (recognizing that indigent appellants often suffer disadvantages at the trial court level because of their poverty). Even if trial counsel spotted the error, a typical indigent defendant cannot possibly be expected to know which of his trial counsel's objections, if any, merit appellate review. *See Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) (recognizing, in a guilty plea appeal, that "[t]o require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants"); *see also Smith*, 528 U.S. at 279 n. 10 ("an indigent does, in all cases, have the right to have an [appellate] attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments"). Finally, even if the indigent somehow does correctly identify his meritorious appellate issues, he still must overcome the daunting procedural hurdles necessary to perfect his application for leave to appeal.

In short, the vast majority of indigent defendants who wish to appeal from their sentences or pleas would receive only a "meaningless ritual," while moneyed defendants would

receive "a meaningful appeal." *Douglas*, 372 U.S. at 358. The statute violates the Fourteenth Amendment, and the statutory exceptions cannot save it.

C. An Indigent Defendant Cannot Be Forced to Waive His or Her Right to Equal Treatment and Due Process As a Condition of Pleading Guilty.

Respondent Kolenda and one of Petitioners' *amici* argue that even if indigent plea defendants in Michigan have the right to the assistance of appellate counsel, the statute requires them to make a valid waiver of that right as a condition of entering a guilty plea. Kolenda Brief at 17-20; Brief of *Amici Curiae* Iowa, et al., at 15-21. This argument fails for several reasons.

First, this argument is not properly before the Court as it was never raised in the Petition for Writ of Certiorari, nor, for that matter, does it appear in Petitioners' Brief on the merits. Neither the district court nor the Sixth Circuit ever addressed this argument because Petitioners also never advanced it there. The argument has therefore been waived. *See Muhammad v. Close*, ___ U.S. ___, 124 S.Ct. 1303,1306-1307 (2004) (holding that "[h]aving failed to raise the claim when its legal and factual premises could have been litigated," party "cannot raise it now").

Second, the argument ignores the fact that the purported "waiver" itself violates the Fourteenth Amendment because it applies only to the indigent. The statute does not require a moneyed criminal defendant to give up his or her constitutional right to the assistance of appellate counsel by pleading guilty. Only the poor lose their right to a meaningful appeal.

As this Court has long recognized, a criminal defendant usually receives substantial benefits in exchange for entering a guilty plea. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). If the statute were upheld, however, an indigent defendant could obtain these substantial benefits only by losing any opportunity for meaningful review of any errors the judge

or prosecutor might commit at sentencing, while a moneyed defendant would not be required to give up meaningful appellate review of such sentencing errors.

Michigan could not constitutionally enforce a statute that would require only black and female defendants to give up their right to appellate counsel in order to receive the benefits of a guilty plea because such a discriminatory "waiver" requirement would plainly violate the Fourteenth Amendment. For the same reason, it cannot constitutionally require indigents, and only indigents, to give up their right to the assistance of appellate counsel in order to obtain the benefits of a guilty plea because the Fourteenth Amendment also protects indigents from discrimination in the criminal justice system. As the Court explained in *Douglas*:

> In *Griffin v. Illinois*, [351 U.S. 12 (1956)], we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. [In *Griffin*], the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."

Douglas, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19).

If the procedure set forth in the statute really did amount to a constitutional way of abrogating an indigent's Fourteenth Amendment right to the assistance of appellate counsel, Michigan could also presumably require indigents to waive their right to free transcripts (guaranteed by *Griffin)* and require them to pay the appellate filing fees. *See Burns v. Ohio*, 360 U.S. 252, 257-258 (1959) (holding Fourteenth Amendment prohibits

State from requiring indigents to pay appellate filing fees). That is, Michigan could make it effectively impossible for indigents to appeal, while fully preserving the right of moneyed defendants to appeal.

But that is exactly what this statute does. An indigent appellant forced to proceed without the assistance of appellate counsel, like the indigent forced to proceed without transcripts or the indigent whose appeal can proceed only upon payment of filing fees, "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas,* 372 U.S. at 358. The argument of Respondent Kolenda and *amici curiae*, which Petitioners have never advanced in this Court or in any lower court, therefore proves too much.[7] Because it requires only the poor to give up their right to a meaningful appeal from any errors that might arise after the "waiver," while moneyed defendants waive nothing at all, the supposed "waiver" is itself unconstitutional.

[7] Indeed, if Michigan could constitutionally require indigents, and only indigents, to give up their right to appellate counsel as a condition of pleading guilty, presumably Michigan could also require such indigents to give up their right to counsel at sentencing as a condition of pleading guilty.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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Date: June 4, 2004

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(13)

No. 03-407

In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A. CRANE,
AND JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF RESPONDENT JUDGE DENNIS C. KOLENDA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

I. THE RESPONDENT ATTORNEYS LACK STANDING TO CHALLENGE THE MICHIGAN STATUTE 1

A. This Court Strictly Adheres to the Requirements for Prudential Standing. 1

B. The Issue of *Jus Tertii* Standing Was Not Waived By Failure to Raise it Below. 2

C. Respondent Attorneys Do Not Have Third Party Standing To Present A Constitutional Challenge On Behalf of the Indigent Criminal Respondents Who Themselves Lack Standing Due to the Principles Expressed in *Younger* 5

D. Recent Events Continue to Demonstrate the Likelihood That There Will Be a Proper Party With Direct Standing to Raise the Issue Regarding the Constitutionality of MCL 770.3a 6

II. P.A. 1999 NO. 200 IS CONSTITUTIONAL 7

RELIEF REQUESTED 9

INDEX OF AUTHORITIES

Cases

Caplin & Drysdale, 491 U.S. 617 (1989) 5

Cary v. Population Services, 431 U. S. 678 (1977) 5

City of Edmond v. Robinson, 517 U.S. 1201 (1996) 2

Craig v. Boren, 429 U.S. 190 (1976) 2,5

Elk Grove Unified School Dist. v. Newdow, 542 U.S. _____(June 14, 2004) 1

Gilmore v. Utah, 429 U.S. 1012 (1976). 1

Lewis v. Casey, 518 U.S. 343 (1996) 2

McKane v. Durston, 153 U.S. 684 (1894) 8

People v. Bulger, 462 Mich. 495 (2000) cert. denied 531 U.S. 994 (2000) 7

People v. Harris, Mich. Ct. App. No. 253152 (2/23/04) .. 6

People v. Harris, 2004 Mich Lexis 1210 (6/25/04) 6

Powers v Ohio, 499 U.S. 400 (1991) 3

Singleton v. Wulff, 428 U. S. 106 (1976) 5

United States Dept. of Labor v. Triplett, 494 U.S. 715 (1990) 5

United States v. Hays, 515 U.S. 737, 742 (1995) 2

Statutes and Court Rules

MCL 770.3a ..... passim

ARGUMENT

I. THE RESPONDENT ATTORNEYS LACK STANDING TO CHALLENGE THE MICHIGAN STATUTE

A. This Court Strictly Adheres to the Requirements for Prudential Standing.

Just most recently, this Court affirmed its commitment to the "strictest adherence" to standing requirements when matters of great national significance are at stake. *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. _____(Slip Opinion at § III; June 14, 2004). The plurality opinion emphasized the need to balance:

> "the heavy obligation to exercise jurisdiction against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary."
> 542 U.S. at ____; Slip Op at p. 8) (citations omitted)

Indeed, the issue of prudential standing is so important that this Court has even declined to exercise jurisdiction in a death penalty case where: 1) the plaintiff was the convict's mother; and 2) there were serious, but unresolved constitutional questions surrounding the Utah death penalty statute which was to be imposed on her son. *Gilmore v. Utah,* 429 U.S. 1012 (1976).[1]

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[1]The *Gilmore* case also suggests a response to the Respondents' and their *amici's* position that appointed appellate

Part of the inquiry necessary to determine whether this Court should exercise the self-restraint related to the issue of prudential standing is whether plaintiff's complaint comes within "the zone of interests protected by the law invoked." *Id.* Slip Op at p. 8. And regardless of whether the plaintiff can establish grounds for Article III standing, this Court must still address the prudential concerns related to standing, *Id.* at p. 14, which cannot be waived.

B. The Issue of *Jus Tertii* Standing Was Not Waived By Failure to Raise it Below.

For years, this Court has recognized that standing is a fundamental constitutional issue, entwined with its jurisdiction over cases. In other words, the issue of standing in this Court is jurisdictional. Contrary to the Respondent Attorneys' claim, it cannot be waived. *United States v. Hays,* 515 U.S. 737, 742 (1995); *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *see also City of Edmond v. Robinson,* 517 U.S. 1201 (1996), (Rehnquist, J. dissenting from the denial of certiorari, stating that the writ should be entered and the parties should address the issue of standing which no one challenged below.)

Jurisprudential considerations of *jus tertii* standing are part of this Court's fundamental philosophy of avoiding involvement in state cases, especially those involving state criminal statutes, until the state's highest court has ruled on

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counsel is necessary to ferret out those meritorious cases where appeal is desirable. Gilmore's appointed counsel constantly appealed against his wishes to have the death penalty imposed promptly. 429 U.S. at 1015. It is likely no secret that appointed counsel are faced with more malpractice cases and grievances than retained attorneys.

the issue. As part of its "judicial self-governance", this Court may raise the issue of standing on its own. *Craig v. Boren,* 429 U.S. 190, 192 (1976).

Regardless of this Court's repeated declaration that the issue of standing cannot be waived, the fact is that the parties to this case did raise the issue. Contrary to Respondent's claim that Petitioners never challenged the second and third prongs of the *jus tertii* test for standing, the briefs submitted to the Sixth Circuit demonstrate otherwise. Judge Kolenda's opening brief discussed, at length, the adequate opportunity guilty-pleading defendants would have within the state system to raise their constitutional claims related to the appointment (or lack thereof) of counsel. One point of the third prong of the *jus tertii* test for standing[2] is to protect federalism concerns; an issue in this case which Judge Kolenda has emphasized from the beginning of his involvement.[3]

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[2]That there must be some hindrance to the third party's ability to protect his or her own interests, *Powers v Ohio,* 499 U.S. 400, 410-411 (1991).

[3]Judge Kolenda was never a party at the District Court level of this case. After the District Court for the Eastern District of Michigan declared MCL 770.3a unconstitutional, the named Defendant Judges appealed to the Sixth Circuit. While that appeal was pending, the Plaintiffs moved for an injunction against the named Defendant Judges and Judge Kolenda. Judge Kolenda is a Michigan Circuit Court Judge who sits in Kent County, within the Western District of Michigan. Plaintiffs claimed that Judge Heathscott had continued to deny appointed appellate counsel to indigents who pled guilty or no lo contendre despite the District Court's Declaratory Judgment. They also targeted Judge Kolenda for the injunction because he insisted that, under the rules of

federalism, the Eastern District Court's opinion was not binding on him, a position which was ultimately vindicated.

Judge Kolenda was never served with any process nor given any opportunity to be heard before the district court also enjoined him from failing to appoint appellate counsel for guilty-pleading defendants. On June 30, 2000 the Eastern District Court granted the injunction, applying it to "all other similarly situated non-party judicial officers" In summary, the district court's June 30th Opinion and Order concluded:

> Therefore, for all of the reasons stated above, and under the authority of 42 U.S.C. § 1983, 28 U.S.C. § 2202 and Fed. R. Civ. P. 65, this Court enjoins Judge Lynda L. Heathscott and Judge Dennis C. Kolenda from violating this Court's Order of March 31, 2000; clarifies that such order pertains to all court rules, regulations or procedures designed to implement the Act declared to be unconstitutional; clarifies that such order prohibits all state court judicial officers from taking any action whatsoever to enforce or implement the Act, and states that this Order shall have a binding effect upon such other non-party judicial officers who participate in the practice declared unconstitutional and who receive notice of this Order, including Judge Kolenda.

The named Defendants and Judge Kolenda then appealed. Judge Kolenda requested a stay of the injunction against him, which was granted by the Sixth Circuit. Ultimately, he prevailed on his claim that he could not be enjoined in this case to which he had not been named as a party.

C. Respondent Attorneys Do Not Have Third Party Standing To Present A Constitutional Challenge On Behalf of the Indigent Criminal Respondents Who Themselves Lack Standing Due to the Principles Expressed in *Younger*

None of the cases cited by the Respondents or their *amici* involve standing issues like the ones present here. None present the issue of how *jus tertii* standing can be granted when the directly interested parties themselves are precluded from seeking relief based on principles of federalism. None of the Respondents' and their *amici's* supporting cases address this paradox. In addition, their cases involve persons asserting *jus tertii* standing with a much greater direct interest in the statute they challenge. Those plaintiffs either faced the possibility of serious personal consequences for their own conduct (e.g. doctors who would face criminal penalties for performing them, *Singleton v. Wulff,* 428 U. S. 106 (1976); attorneys who would lose a concrete fee in a case involving an existing client, *Caplin & Drysdale,* 491 U.S. 617 (1989); or risk possible professional sanctions, *United States Dept. of Labor v. Triplett,* 494 U.S. 715 (1990); vendors who would face penalties including possible loss of state-granted license for statutory violation; *Craig v. Boren,* 429 U.S. 190 (1976); or loss of sales of their product; *Cary v. Population Services,* 431 U. S. 678 (1977). In short, no case Respondents and their *amici* cite demonstrates the end run around the principle of federalism so apparent here.

D. Recent Events Continue to Demonstrate the Likelihood That There Will Be a Proper Party With Direct Standing to Raise the Issue Regarding the Constitutionality of MCL 770.3a

Even since Judge Kolenda's Brief on the Merits filed here, there have been new developments in the federalism issue involved in this case. Despite the Sixth Circuit's decision on which it relied, the Michigan Court of Appeals ignored that decision as to Judge Kolenda. It again ordered him to appoint counsel for an indigent, guilty-pleading defendant. *People v. Harris,* Mich. Ct. App. No. 253152 (2/23/04)[4]. After the Court of Appeals issued this order, the Kent County prosecutor sought leave to appeal to the Michigan Supreme Court. At that point Judge Kolenda appointed counsel for Ms. Harris under MCL 770.3a (2)(a).[5] Instead of granting leave to appeal, the Michigan Supreme Court summarily reversed. *People v. Harris,* 2004 Mich Lexis 1210 (6/25/04). (Copy of Order Attached as App 1-3)

The Michigan Supreme Court's Order finally directed Michigan's lower courts, including its Court of Appeals to follow its decisions over those of lower federal courts. Only

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[4]It is interesting to note that Harris challenged her sentence even though it was within the Michigan Sentencing Guidelines both: 1) as scored by the probation department; and 2) as scored by Harris' defense counsel who disagreed with and challenged probation's scoring. One can therefore only wonder what will be the basis of her appeal for which she wants an attorney.

[5] The portion of the challenged statute requiring the appointment of counsel where the prosecutor seeks leave to appeal. Ironically, appointed counsel for Ms. Harris did not file any opposition to the prosecutor's leave application.

this Court can overrule the state's highest court's decision on a federal constitutional issue. Accordingly, the Michigan Supreme Court directed all the lower courts to follow its decision in *People v. Bulger,* 462 Mich. 495 (2000) *cert. denied* 531 U.S. 994 (2000). Harris is now positioned to file a Petition for Writ of Certiorari to this Court if she wants to. We do not have to await the long parade of horribles that Respondents and their *amici* predict if this Court decides, as it should, that the Attorney Respondents have no standing to litigate this issue. The obstacles the Respondents and their *amici* foresee for future guilty-pleading defendants interested in this issue clearly did not materialize. Indeed, if Harris files a petition for writ of certiorari on her own[6], this Court can even appoint counsel for her if it decides to grant the writ and decide the issue raised here.

For these reasons, both the District Court and the Sixth Circuit should have exercised "judicial self-governance" and held that none of the named Respondents had standing to bring this case.

II. P.A. 1999 NO. 200 IS CONSTITUTIONAL

The *amicus,* National Legal Aid and Defender Association ("NLADA"), totally mis-perceives Judge Kolenda's position regarding the waiver required of guilty-pleading defendants. There is no argument that the statute should be broken down to analyze its constitutionality. Section 1 survives constitutional muster because the waiver provision in MCL 770.3a (4) puts the analysis in context. The statute must be read as a whole. Obviously, the purpose of subsection 4 is to define what must be included in the waiver

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[6]As this Court well knows that prisoners do every day.

that is accepted with a guilty plea. The constitutionality of the statute must be understood by recognizing the waiver provision as an integral part of the statute, not a piece to be analyzed separately.

The statute is designed to honor the waiver as part of the consideration the defendant brings to the plea bargaining process, just like giving up the right to trial, confrontation, etc. It is the defendant's choice in exchange for whatever concessions the state provides in the process. Respondents and their *amici* apparently believe that every indigent criminal defendant ought to be entitled to all the benefits of a good deal (i.e. the plea bargain) and yet retain, despite his waiver to the contrary, the right to upset it by appealing.

Undermining its own position, *Amicus*, American Bar Ass'n ("ABA") even quotes its own Criminal Justice Standard 21–3.2(a) regarding counsel on appeal. Despite its extreme position[7], the ABA's Standard even specifically recognizes the validity of the waiver of counsel on appeal, even for indigent defendants.

Just as the NLADA attempts to argue the constitutionality of the statute by breaking it into pieces, so too do all the Respondents and their *amici* fail to consider all the component rules of the Michigan criminal justice system and how they interconnect to protect the rights of defendants who wish to raise post-conviction issues related to their cases.

---

[7]That all states should include an appeal of right from a criminal conviction under all circumstances. ABA's Brief p. 3) This, of course, is contrary to this Court's position that the states do not have to provide any right to appeal. *McKane v. Durston,* 153 U.S. 684 (1894).

RELIEF REQUESTED

Wherefore, Respondent, Judge Dennis Kolenda, respectfully requests that this Court reverse the decision of the *en banc* Sixth Circuit.

Respectfully submitted:

Dated: July 9, 2004

_____

Judy E. Bregman

Order

Entered: June 25, 2004

125762

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.,
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MELODY HARRIS,

Defendant-Appellee /

SC: 125762
COA: 253152
Kent CC: 03-004744-FC

On order of the Court, the application for leave to appeal the February 23, 2004 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the order of the Court of Appeals and REINSTATE the Kent Circuit Court's November 24, 2003 order denying appointment of appellate counsel. This Court held in *People v Bulger*, 462 Mich 495 (2000), that the federal Constitution does not require the appointment of counsel at public expense when an indigent defendant applies for leave to appeal a plea-based conviction. Pursuant to the analysis provided by this Court in *Bulger*, MCL 770.3a is constitutional. The courts of this state are obligated to apply that statute, any lower federal court opinions to the contrary notwithstanding.

Abela v General Motors Corp, 469 Mich 603 (2004). The time for defendant to file an application for leave to appeal under MCR 7.205 runs from the date of this order.

Cavanagh, J., would hold this case in abeyance for *Kowalski v Tesmer*, cert gtd ___ US ___; 124 S Ct 1144; 157 L Ed 2d 1041 (2004).

Kelly, J., dissents and states as follows:

I would hold this case in abeyance until the United State Supreme Court decides *Kowalski v Tesmer*, cert gtd ___ US ___; 124 S Ct 1144; 157 L Ed 2d 1041 (2004).

I acknowledge that we are not bound by the Sixth Circuit's holding in *Tesmer v Granholm*, 333 F3d 683 (CA 6, 2003). However, we will be bound by the United States Supreme Court's decision.

The majority's ruling that reverses and remands this case promotes judicial inefficiency. This case and others like it will come back to the Court of Appeals for a second review if the Sixth Circuit's decision is upheld.

Instead of denying defendant's application, the Court should issue an order explaining that trial courts should appoint appellate counsel pending the *Tesmer* decision. This would avoid numerous repeat applications to the Court of Appeals should the Supreme Court affirm the Sixth Circuit's holding that it is unconstitutional to deny appointment of counsel to criminal defendants who plead guilty.

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____ 200__ _____

Clerk

(14)

No. 03-407

Supreme Court, U.S.
FILED
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In the
Supreme Court of the United States

JUDGE JOHN F. KOWALSKI,
JUDGE WILLIAM A CRANE, And
JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent

v

JOHN CLIFFORD TESMER, CHARLES CARTER,
ALOIS SCHNELL, ARTHUR M. FITZGERALD, And
MICHAEL D. VOGLER,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

The Michigan Constitution, Mich Const 1963, art I, § 20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel "as provided by law." A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that a criminal defendant who pleads guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant's conviction or sentence.

I. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

II. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 4

I. The Respondent Attorneys Do Not Have Standing. 4

A. The Issue Of The Respondent Attorneys' Standing Was Raised, Preserved, And Decided In Every Court Below, And Is Properly Before This Court. 4

B. Respondent Attorneys Have Not Suffered An "Injury In Fact." 7

C. Respondent Attorneys Do Not Have Sufficiently Close Relation To Unknown Potential Indigent Defendants. . 9

D. There Are No Significant Obstacles To Future Indigent Criminal Defendants Asserting Their Own Rights. 10

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions. 13

A. Michigan Court Of Appeals Orders Denying Applications For Leave To Appeal Are Not Decisions On The Merits Of The Legal Issues. 15

B. Defendants Who Plead Guilty Have Adequate Opportunity To Present Their Claims Fairly 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Ambs v Kalamazoo County Road Commission,
255 Mich App 637; 662 NW 2d 424 (2003) 17

Caplin & Drysdale, Chartered v United States,
491 US 617 (1989) 4, 5, 8

City of Revere v Massachusetts General Hospital,
463 US 239 (1983) 6

Coleman v Thompson,
501 US 722 (1991) 15

Contineri v Clark,
2003 WL 21771236 (Mich Ct App 2003) 17

Craig v Boren,
491 US 617 (1976) 6, 8

DiCicco v City of Grosse Poine Woods,
2002 WL 346126 (Mich Ct App 2002) 17

Douglas v California,
372 US 353 (1963) ..... passim

Elk Grove Unified School District v Newdow,
542 US ___; *2004 US LEXIS 4178; 72 USLW 4457* 4, 7

Evitts v Lucey,
469 US 387 (1985) 15

FW/PBS, Inc v City of Dallas,
493 US 215 (1990) 5, 8, 10

Georgia v McCollum,
505 US 42 (1992) 9

Great Lakes Realty Corp v Peters,
336 Mich 325; 57 NW 2d 901 (1953) 16

Griffin v Illinois,
351 US 12 (1956) 1, 14

Jenkins v McKeithen,
395 US 411 (1969) 5

Lujan v Defenders of Wildlife,
504 US 555 (1992) 8

McKane v Durston,
153 US 684 (1984) 14

McKenzie v Smith,
326 F 3d 721 (6th Cir., 2003) 18

Muhammad v Close,
540 US ___; 124 S Ct 1303; 124 L Ed 2d 32 (2004) 6

Orr v Orr,
440 US 268 (US, 1979) 6

People v Berry,
10 Mich App 469; 157 NW 2d 310 (1968) 16

People v Bulger,
462 Mich 495; 614 NW 2d 103 (2000),
cert den 531 US 994 (2000) 11

People v Douglas,
122 Mich App 526; 332 NW 2d 521 (1983) 16

People v Hayden,
132 Mich App 273; 348 NW 2d 672 (1984) 16

People v Reid,
233 Mich App 457; 592 NW 2d 767 (1999) 17

People v Tooson, (In re Withdrawal of Attorney),
231 Mich App 504; 231 NW 2d 504 (1998) 16

People v Weathers,
2003 WL 21362810 (Mich Ct App 2003) 17

People v Wiley,
112 Mich App 344; 315 NW 2d 540 (1981) 16

Powers v Ohio,
499 US 400 (1991) 5, 9, 10

Ross v Moffitt,
417 US 600 (1974) ..... passim

Sabaugh v Riga,
2003 WL 21362981 (Mich Ct App 2003) 17

Sabri v United States,
541 US ___; 124 S Ct 1941, 1948; 158 L Ed 2d 891 (2004) 3

Smith v Robbins,
528 US 259 (2000) 15

Southfield Police Officers Association v Southfield,
433 Mich. 168; 445 NW 2d 98 (1989) 17

State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc,
111 Mich App 16; 314 NW 2d 512 (1981), *lv den,* 414 Mich 951 (1982) 16

Swenson v Bosler,
386 US 258 (1967) 15

United States Department of Labor v Triplett,
494 US 715 (1990) 9

United States v Salerno,
481 US 739 (1987) 2

Valley Forge Christian College v Americans United for Separation of Church & State,
454 US 464 (1982) 11

Younger v Harris,
401 US 37 (1971) 12

Statutes

MCL 769.34(10) 19

MCL 770.3a i

MCL 770.3a(2)(a)-(d) 2

MCL 770.3a(2)(c) 11, 19

MCL 770.3a(3)(a)-(c) 2

Rules

Fed R Civ P 12(h)(3) 5

MCR 6.505(A) 20

MCR 7.215(B), (C), and (E) 17

MCR 7.215(E)(1) 17

MCR 7.501 et seq 20

MCR 7.508(3) 20

Constitutional Provisions
Mich Const 1963, art I, § 20 i

US Const, Amend VI 14

US Const, Art III 5

INTRODUCTION

1. The concept of third-party standing is elastic, but it should not be stretched so thin as to grant attorneys an open-ended right to eschew actual clients with rights at stake in concrete controversies and instead litigate speculative constitutional claims on behalf of potential future clients. Respondent Attorneys could have represented actual criminal defendants who would be subject to the Michigan statutory provisions concerning appointed counsel on appeals from guilty plea convictions. Their clients could have brought their challenge in direct appeals in the Michigan courts, and could then have sought collateral review in the federal courts by way of habeas corpus. Instead, in the absence of clients and a factual context, Respondent Attorneys chose a litigation strategy of evading the Michigan appellate courts and evading the federal habeas corpus courts. They brought a facial challenge in a federal court before the statute even took effect, seeking declaratory and injunctive relief against Michigan trial judges. They do not assert that *they* have any constitutional rights at stake but they assert the broad right to litigate rights of future clients they might someday represent.

2. Appointed appellate counsel is constitutionally required only if a first appeal is decided on the merits of the issues presented. *Douglas v California*, 372 US 353 (1963). That is because such an appeal is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin v Illinois*, 351 US 12, 18 (1956). In contrast, the Constitution does not require appointed appellate counsel for an application for leave to appeal, particularly from a guilty plea conviction, to an intermediate State appellate court when the only question is whether the appellate court will exercise its discretion and accept the appeal. In such a system, "[t]he critical issue . . . is not whether there has been 'a correct adjudication of guilt' in every individual case." *Ross v Moffitt*, 417 US 600, 615 (1974) (citing *Griffin*).

Respondent Attorneys' arguments are based on the mistaken premise that Michigan's discretionary applications for leave to appeal from guilty plea convictions are appeals on the merits of the underlying legal issues. They are not. Respondent Attorneys refuse to acknowledge binding Michigan precedent holding that applications for leave to appeal do not invoke the appellate court's plenary jurisdiction and that orders denying such applications are simply determinations not to accept the appeal; they are not decisions on the merits of the underlying legal issues. If such an application is accepted and an appeal on the merits is granted, the Michigan statute requires appointment of appellate counsel. Because orders of the Michigan Court of Appeals denying applications for leave to appeal are not decisions on the merits, the application process is analogous to the discretionary appeals in *Ross* and not the appeals on the merits as in *Douglas*. There is no constitutional right to an appointed appellate counsel for such discretionary applications.

3. The problematic nature of Respondent Attorneys' lawsuit is highlighted by the fact that they have brought a facial challenge to the entire Michigan statute. They cannot prevail unless they "establish that no set of circumstances exists under which the Act would be valid." *United States v Salerno*, 481 US 739, 745 (1987). They cannot meet that requirement, since the statute contains explicit provisions mandating appointment of appellate counsel in certain circumstances, MCL 770.3a(2)(a)-(d), and permitting it in others, MCL 770.3a(3)(a)-(c). An actual criminal defendant who pleaded guilty and then was denied appointed appellate counsel could properly allege that the statute was unconstitutional *as applied to him*. The premature and abstract nature of the challenge brought by Respondent Attorneys precludes the existence of any such injury in fact, and as demonstrated in Petitioner Judges' brief, adjudication in such circumstances is inappropriate. This Court recently reiterated that "facial challenges are best when infrequent." *Sabri v United States*,

541 US ___; 124 S Ct 1941, 1948; 158 L Ed 2d 891 (2004). There a criminal defendant sought to bring an overbreadth challenge to a criminal statute, alleging that it could not be applied to him because it could not be applied to others. In language appropriate to the present case, the Court observed that such facial challenges "invite judgments on fact-poor records," "call for relaxing familiar requirements of standing," and seek "a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Id.*

ARGUMENT

I. The Respondent Attorneys Do Not Have Standing.

A. The Issue Of The Respondent Attorneys' Standing Was Raised, Preserved, And Decided In Every Court Below, And Is Properly Before This Court.

Respondent Attorneys' assertion that Petitioner Judges did not challenge, and therefore waived, the issue of Respondent Attorneys' standing is simply incorrect. Beginning with the motion to dismiss (filed three weeks after the complaint), the brief in support of the motion, and the reply brief filed in the District Court, and continuing with the brief, the reply brief and the supplemental brief on rehearing filed in the Court of Appeals, Petitioner Judges raised and preserved their challenge to the Respondent Attorneys' standing. The District Court, the three-judge panel in the Court of Appeals, and the *en banc* Court of Appeals all considered the issue sufficiently presented, all carefully addressed it, and all decided it.

Respondent Attorneys assert that Petitioner Judges did not sufficiently discuss all three "requirements" of the doctrine of *jus tertii* standing, but in addition to being wrong, their arguments are misplaced. What they describe as "requirements" are not hard-and-fast prerequisites, all of which must be met; they are simply examples of the type of prudential considerations the Court has examined in determining whether to permit an entity to litigate a particular claim. See *Elk Grove Unified School District v Newdow,* 542 US ___; 2004 US LEXIS 4178; 72 USLW 4457; slip opinion at 8 (2004)("we have not exhaustively defined the prudential dimensions of the standing doctrine"). Compare, for example, the different formulations of the "factors" in *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624 n 3 (1989) and the "criteria" in *Powers v Ohio*, 499 US 400, 410-

411 (1991). In *Caplin & Drysdale,* the Court even permitted *jus tertii* standing where not all of the factors were met ("The second of these three factors counsels against review here . . . We think the first and third factors, however, clearly weigh in petitioner's favor. . . . Petitioner therefore satisfies our requirements for *jus tertii* standing." 491 US at 624, n 3.).

Petitioner Judges' arguments concerning Respondent Attorneys' standing focused on their lack of direct personal stake in the controversy, a core aspect of the case or controversy requirement of US Const, Art III that cannot be waived. Fed R Civ P 12(h)(3); *Jenkins v McKeithen*, 395 US 411, 421 (1969)("since the question of standing goes to this Court's jurisdiction, . . . we must decide the issue even though the court below passed over it without comment."); *FW/PBS, Inc v City of Dallas*, 493 US 215, 230-231 (1990) ("Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, . . . and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'")(Citation omitted).

Petitioner Judges also discussed prudential limitations on the exercise of judicial power and presented arguments that there was no client relationship and that indigent defendants were able to present their own claims in their own appeals. See, e.g., District Court brief, pp 11-12; District Court reply brief, pp 2-3, 3-4; Court of Appeals brief pp 28-29, 32-33.

Most importantly however, the lower courts believed the issue of the Respondent Attorneys' standing was sufficiently presented, and they discussed the issue in detail and decided it on the merits. See District Court opinion, Pet App 93a-100a; Court of Appeals panel opinion, Pet App 73a-77a; Court of Appeals *en banc* opinion 10-19a. There can be no waiver of an issue that was explicitly decided below. *Cf. Orr v Orr*, 440 US

268, 274-275 (US, 1979)(where state courts expressly decided a federal law issue, objection that the issue was not preserved was "untenable," and Court applied "the 'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.' *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914).").

This is not a situation like *Craig v Boren*, 491 US 617, 193-194 (1976) where the government never raised the question of standing. Nor is it like *Muhammad v Close*, 540 US ___; 124 S Ct 1303, 1306-1307; 124 L Ed 2d 32, 38 (2004) where this Court held that the government could not raise a claim in this Court because it "failed to raise the claim [in the District Court and Court of Appeals] when its legal and factual premises could have been litigated."

Respondent Attorneys state in passing that this case is one in which the question of standing is "inextricably intertwined" with the merits, so apparently even if they do not have standing, it "would not have been error" for the Court of Appeals to decide the merits of the constitutional issue. Brief, 17, n 5, citing *City of Revere v Massachusetts General Hospital,* 463 US 239, 243 (1983). In *Revere*, this Court, after noting that the hospital had its own Article III standing but that the prudential reasons for giving it standing to assert the rights of third parties were weak, concluded that it "could not resolve the question whether [the hospital] has third-party standing without addressing the constitutional issue" and that if it found a lack of standing the result would be to dismiss the petition for certiorari. *Id*, at 243, n 5 and accompanying text.

In the present case, however, the third-party standing claim of the Respondent Attorneys is completely independent of the constitutional question of the right of indigent defendant to appointed appellate counsel in discretionary appeals. The case can be resolved by reversing the Court of Appeals on the

standing question, reversing its judgment, and remanding with instructions to dismiss the complaint. See *Newdow, supra*, slip opinion at 7-8, where the Court of Appeals had decided a standing issue and a constitutional issue, but this Court, noting the "'deeply rooted' commitment 'not to pass on questions of constitutionality'" unless necessary, reversed on the standing issue, reversed the judgment, and did not reach the constitutional issue: "Even in cases concededly within our jurisdiction under Article III, we abide by 'a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision.'" (Internal citations omitted.)

The issue of the Respondent Attorneys' standing was timely raised, properly preserved, and explicitly decided below. It is properly before this Court for decision, independent of the issue of the asserted right to appointed appellate counsel.

B. Respondent Attorneys Have Not Suffered An "Injury In Fact."

Contrary to Respondent Attorneys' characterization, Brief p 17, Petitioner Judges do not claim that special rules of standing apply to attorneys. Petitioner Judges do not assert that attorneys can never have standing or that potential economic harm is never enough to confer standing. Petitioner Judges only assert that when individuals subject to a new state statute have adequate opportunity to challenge it themselves they should do so. Attorneys as to whom the statute does not directly apply and who have no present clients do not have independent standing to bring a facial challenge to the statute simply by asserting that potential future clients might be subject to the statute and that the attorneys' future income might be affected.

Petitioner Judges' brief demonstrates that Respondent Attorneys have not suffered any "injury in fact," *Lujan v*

Defenders of Wildlife, 504 US 555, 560 (1992), and nothing in the Attorneys' brief demonstrates the contrary. They cite *FW/PBS, Inc v City of Dallas*, *supra*, 493 US 215, for the proposition that a loss of income is sufficient to establish standing, but the decision does not say that. There a city ordinance defined motels that rent rooms for less than 10 hours as sexually oriented businesses subject to regulation. Motel owners alleged, among other things, that the 10-hour limitation placed an unconstitutional burden on the right to freedom of association. Since the motels were explicitly covered by the ordinance, this Court held that they had a live controversy against enforcement of the ordinance as to them, but it explicitly declined to adjudicate the question of the owners' standing to litigate on behalf of others, 493 US at 237: "It is not clear, however, whether they have prudential, *jus tertii* standing to challenge the ordinance on the ground that the ordinance infringes the associational rights of their motel patrons." The Court said nothing about loss of income establishing standing.

It is ironic that Respondent Attorneys should cite this case, since elsewhere in the decision the Court held that because none of the plaintiffs were subject to the civil disabilities the ordinance imposed, none of them had standing to challenge those provisions. *Id.*, at 232-235.

Respondent Attorneys also rely on *Caplin & Drysdale, supra*, 491 US 617, and *Craig v Boren, supra*, 491 US 617, but as explained in Petitioner Judges' brief, both of those cases involved statutes that directly affected the parties that were granted standing. Respondent Attorneys have cited no case where an attorney's mere hope or expectation of a fee from a potential future client who might be affected by a new statute was sufficient to establish third-party standing. Granting standing to Respondent Attorneys here would be a significant and unwise expansion of this Court's prudential standing doctrine.

C. Respondent Attorneys Do Not Have Sufficiently Close Relation To Unknown Potential Indigent Defendants.

None of the cases cited by Respondent Attorneys at pp 11-15 of their brief stands for the proposition that when the parties affected by a statute can bring their own challenge, attorneys who are not directly affected by the statute and who have no present clients nevertheless have standing to bring a facial constitutional challenge asserting the rights of potential future clients who might be subject to the statute. As explained in Petitioner Judges' brief, pp 17-24, all of the cases the Respondent Attorneys cite in which parties were held to have standing to assert the rights of others involved situations where the parties themselves were directly affected (*see, e.g., United States Department of Labor v Triplett*, 494 US 715 (1990) where an attorney faced State disciplinary sanctions); where the party had a present client who was directly affected (*see, e.g., Triplett, Caplin & Drysdale, supra* 491 US 617); or where there were "daunting barriers" to the ability of third parties to assert their own claims (*see, e.g., Powers, supra*, 499 US at 411). None of those circumstances is present here.

For example, Respondent Attorneys cite *Georgia v McCollum*, 505 US 42, 56 (1992) where the Court held that the State could assert the rights of potential jurors who had been excluded for racially discriminatory reasons. The State, of course, was a party to the criminal trial at issue, and as "the representative of all its citizens" was the "logical and proper party" to assert the rights of the excluded jurors who, like the jurors in *Powers v Ohio*, 499 US 400, 414 (1991)(discussed in Petitioner Judges' brief, p 23) faced "daunting barriers" to bringing suit themselves. In the present case the Respondent Attorneys are not parties to any underlying lawsuit, they are not logical or proper parties to assert hypothetical rights of

potential future clients, and there are no barriers to such future clients asserting their own rights.[1]

This Court should decline Respondent Attorneys' invitation to declare that attorneys have open-ended standing to bring facial constitutional challenges on behalf of unknown potential future clients who are free to assert their own rights.

D. There Are No Significant Obstacles To Future Indigent Criminal Defendants Asserting Their Own Rights.

When making the prudential determination whether an entity has standing to assert the rights of a third party, this Court has examined whether there is a hindrance to the third party's ability to protect his own interests. *Powers v Ohio, supra*, 499 US at 411. The Respondent Attorneys' arguments reveal that their true concern is not that future indigent defendants could not protect their own interests; rather it is that the normal process of litigation by affected parties would take too long and would not be successful.

Respondent Attorneys acknowledge that "the federal courts would abstain from hearing the challenge of any individual indigent denied appellate counsel," Brief, p 19, so such litigants would have to proceed in the Michigan courts and then

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[1] Respondent Attorneys' assertion at Brief, p 13, fn 3 and accompanying text, that they currently represent individuals subject to the challenged statute is an improper attempt to enhance the record. They chose to bring this facial challenge in the absence of clients who were directly affected by the statute, and it is now too late to change that strategy. In *FW/PBS v Dallas, supra*, 493 US at 235, this Court rejected a similar effort to enhance the record by a tardy affidavit and statements at oral argument: "We do not rely on the city's representations at argument as 'the necessary factual predicate may not be gleaned from the briefs and arguments themselves.' And we may not rely on the city's affidavit, because it is evidence first introduced to this Court and 'is not in the record of the proceedings below.'" (Internal citations omitted.)

the federal habeas corpus courts.[2] They also acknowledge, Brief, p 20, the precedential effect of *Bulger, supra*, 462 Mich 495. They decry the time such litigation would take, however, and assert that "if attorneys such as [themselves] cannot challenge this statute in federal court," there would be no "realistic prospect of federal judicial intervention." Brief, p 20.

There is no entitlement to "federal judicial intervention" in the normal State court process of litigating the validity of State statutes. Respondent Attorneys are merely dissatisfied that the normal course of litigation in the Michigan courts by real parties whose rights are at stake would not achieve the result these attorneys desire: swift declaratory and injunctive relief by a federal judge in a broad facial challenge to a State statute in the absence of any actual clients and any actual facts. In *Valley Forge Christian College v Americans United for Separation of Church & State*, 454 US 464, 489 (1982) this Court recognized that "'[the] assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" (Citation omitted.)

A critical element of the Court of Appeals' correct conclusion that the federal courts should abstain from hearing the claims of the indigent criminal defendant Respondents was

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[2] They assert that such a litigant would "have to coherently litigate the constitutional issue all the way through the Michigan appellate courts without the assistance of counsel." Brief, p 15. That is incorrect, of course, since the statute does not prohibit counsel, but only pertains to *appointed* counsel for an initial application for leave to appeal. If the application is granted and the merits of the claim are considered, the statute requires appointment of counsel. MCL 770.3a(2)(c). That is precisely what happened in the course of the litigation in *People v Bulger*, 462 Mich 495, 500-503; 614 NW 2d 103 (2000), *cert den* 531 US 994 (2000). Even when counsel is not appointed, the Michigan statute does not prohibit volunteer *pro bono* counsel from representing defendants and filing applications for leave to appeal. See Pet. App. 105a where the District Court discusses the 38-page "lawyerly brief" used by the indigent Resondents in their State court applications. See also, Brief for Respondent Kolenda, at 5; Brief for Amicus State of Iowa, et al, at 13, n 5.

the determination that they had adequate opportunity to raise their own constitutional claims in the Michigan courts. Pet App 9a-10a. In *Younger v Harris*, 401 US 37, 54 (1971) this Court discussed abstention principles and held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." That decision was based on the "longstanding public policy against federal court interference with state court proceedings," the principle that federal court injunctions against State court proceedings "are fundamentally at odds with the function of the federal courts in our constitutional plan," and the recognition that the broad responsibility of the federal courts "does not amount to an unlimited power to survey the statute books and pass judgment on laws before the [State] courts are called upon to enforce them." *Id*, at 42, 52.

Respondent Attorneys now concede that *Younger* principles prohibit claims by actual defendants, and admit that they joined the lawsuit precisely because they were not directly subject to *Younger*. Brief, at 18-19. Petitioner Judges submit that the mere fact that traditional principles of federalism and adjudication of actual cases and controversies prevents Respondent Attorneys from achieving their personal litigation goals is insufficient reason to distort well-recognized principles of standing and give attorneys without clients an open-ended right to bring facial challenges to State statutes.

II. There Is No Constitutional Right To Appointed Counsel In Discretionary Appeals From Guilty Plea Convictions.

Respondent Attorneys' position depends on an odd definition of "discretionary." To them a discretionary appeal means a "second-tier" appeal; the element of choice in deciding whether to grant an appeal is irrelevant. Brief, p 21. To Petitioner Judges, however, a discretionary appeal is one in which an appellate court has a choice whether to accept the appeal (initiated by an application for leave to appeal), as differentiated from appeals by right (initiated by a claim of appeal), which the appellate court must accept. Petitioner Judges' brief, p 29, n 20.

But the labels really do not control. It does not matter whether an appeal is called "direct," "first-tier," "second-tier," "discretionary," or "by right." The fact that the appeals in the present case are from guilty plea convictions rather than full trials is also not controlling. As explained in Petitioner Judges' brief, pp 30-34, a guilty plea represent "a break in the chain of events" that requires the defendant to give up many rights and that limits the number and complexity of issues that may be raised in an application for leave to appeal. Those factors are pertinent in determining the dispositive issue: whether an indigent defendant has "an adequate opportunity to present his claims fairly." *Ross v Moffitt*, 417 US at 616.

What matters for purposes of determining a right to appointed counsel is whether the appellate court decides the merits of the issues. *Douglas v California*, 372 US 353, 357 (1963)("where the *merits* of *the one and only appeal* an indigent has as of right are decided without benefit of counsel,

we think an unconstitutional line has been drawn between rich and poor." (First emphasis added.)[3] See also, *id.*, at 355-356 (discussing importance of the fact that in the system at issue, "the appellate court passes on the merits of his case" and that an attorney was necessary to provide a "real chance . . . of showing that his appeal has hidden merit.") That is because such an appeal is "an integral part of the . . . trial system for finally adjudicating the guilt or innocence of a defendant." *Griffin v Illinois*, 351 US 12, 18 (1956).

In contrast, the Constitution does not require appointed appellate counsel for an application for leave to appeal, particularly from a guilty plea conviction, to an intermediate State appellate court when the only question is whether the appellate court will exercise its discretion and accept the appeal. In such a system, "[t]he critical issue . . . is not whether there has been 'a correct adjudication of guilt' in every individual case." *Ross v Moffitt*, *supra*, 417 US at 615 (citing *Griffin*). To the contrary, the only question is whether the case should be granted plenary review.

In Michigan, applications for leave to appeal from guilty plea convictions are not appeals on the merits, and there is no constitutional right to appointed appellate counsel for such applications.

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[3] One of the amicus briefs supporting Respondent Attorneys (Brief of National Association of Criminal Defense Lawyers and National Association of Federal Defenders) argues that appeals are a "critical stage" of the proceedings at which counsel is constitutionally required. That argument was not made by Respondent Attorneys below or in this Court and was not decided below, so it is not properly before this Court. It is also contradicted by the text of US Const, Amend VI ("In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence"), is contrary to over 100 years of this Court's jurisprudence, *McKane v Durston*, 153 US 684 (1984), and is based entirely on the *Douglas* line of cases where an appellate court rules on the merits of the issues.

Once the fallacy of Respondent Attorneys' premise is recognized, their argument collapses and the authorities on which they rely are shown to be inapposite. For example, *Evitts v Lucey*, 469 US 387 (1985), *Coleman v Thompson*, 501 US 722 (1991), *Smith v Robbins*, 528 US 259 (2000), and *Swenson v Bosler*, 386 US 258 (1967) are all cases in which the Court concluded that under State procedures there was a right to appeal—as distinguished from a discretionary appeal as in the present case. Therefore the *Douglas* principle controlled rather than the *Ross v Moffitt* principle.

A. Michigan Court Of Appeals Orders Denying Applications For Leave To Appeal Are Not Decisions On The Merits Of The Legal Issues.

When the Michigan Court of Appeals denies an application for leave to appeal, it is deciding that it will not take the appeal. It is neither affirming nor reversing the judgment below. It is simply exercising its discretion whether to review the case on the merits.

Respondent Attorneys' entire argument is based on their mistaken premise that under Michigan procedures, an application for leave to appeal to the Court of Appeals is an appeal on the merits of the underlying substantive issues. Binding Michigan precedent, however, conclusively establishes that such applications are not appeals on the merits; they are requests that the Court of Appeals exercise its discretion and accept the appeal, in which the issues would *then* be decided on the merits. That binding precedent also conclusively establishes that orders denying discretionary applications for leave to appeal are not decisions on the merits.

Petitioner Judges' brief, pp 37-46, cites binding Michigan authority for the propositions that when acting on discretionary applications for leave to appeal, the Michigan Court of Appeals does not acquire plenary jurisdiction unless and until it grants

an application, and that orders denying applications for leave to appeal—for whatever reasons—are not decisions on the merits. *People v Tooson, (In re Withdrawal of Attorney),* 231 Mich App 504, 505-506; 231 NW 2d 504 (1998); *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW 2d 901 (1953); *People v Berry*, 10 Mich App 469, 473-474; 157 NW 2d 310 (1968); *State ex rel Saginaw Prosecuting Attorney v Bobenal Invest, Inc,* 111 Mich App 16, 22 n 2; 314 NW 2d 512 (1981), *lv den,* 414 Mich 951 (1982).

Respondent Attorneys disparage these controlling published authorities as "old" without making any serious attempt to distinguish them or cast doubt on their validity. In particular, Respondent Attorneys refuse to acknowledge the reality that *Bobenal* involved orders using language that they rely heavily on in their arguments, *i.e.*, orders containing the language "IT IS FURTHER ORDERED that the application for leave appeal be, and the same is hereby DENIED for lack of merit in the grounds presented". As noted in Petitioner Judges' Brief, pp 41-42 and n 26, the official records of the Michigan Court of Appeals disclose that the orders in *Bobenal* used that precise language.

Instead, surprisingly, they continue to rely on three Michigan Court of Appeals decisions that do not even involve orders denying applications for leave to appeal and therefore have no bearing on the present case.[4]

[4] *People v Hayden*, 132 Mich App 273; 348 NW 2d 672 (1984) *People v Douglas*, 122 Mich App 526; 332 NW 2d 521 (1983) and *People v Wiley*, 112 Mich App 344; 315 NW 2d 540 (1981). As explained in Petitioner Judges' brief, p 42, those cases only involved the preclusive effect of orders denying defendants' motions to remand in the context of subsequent attempts to relitigate the same issues in the appeals on the merits. Those cases do not contradict the holdings of *Bobenal, supra,* and *Peters, supra.*

Even more surprising, they now cite four *unpublished* decisions of the Michigan Court of Appeals to support their arguments.[5] As Respondent Attorneys are well aware, Michigan law is absolutely clear that unpublished Michigan Court of Appeals decisions are binding only on the parties to that case, and have no precedential effect.

The controlling court rule is explicit, MCR 7.215(C)(1): "An unpublished opinion is not precedentially binding under the rule of stare decisis."[6] Additionally, case law is uniform in holding that unpublished opinions are not authoritative. *Southfield Police Officers Association v Southfield*, 433 Mich. 168, 202; 445 NW 2d 98 (1989)("It is indisputable that unpublished opinions of the Court of Appeals have no precedential value. [citing court rule]"); *People v Reid*, 233 Mich App 457, 474; 592 NW 2d 767 (1999)("absent the Supreme Court expressly adopting all or part of an unpublished opinion of this Court, it would be inappropriate to consider any part of such an unpublished opinion as substantively binding in an unrelated case"); *Ambs v Kalamazoo County Road Commission*, 255 Mich App 637, 642; 662 NW 2d 424 (2003)("Although defendants rely heavily on this case as support for their claim . . . , as an unpublished opinion . . . [it] is of neither precedential nor persuasive value on the issue presently before this Court. [citing court rule]").

In short, controlling Michigan authority holds that orders of the Michigan Court of Appeals denying discretionary

[5] *Contineri v Clark*, 2003 WL 21771236 (Mich Ct App 2003); *People v Weathers,* 2003 WL 21362810 (Mich Ct App 2003); *Sabaugh v Riga*, 2003 WL 21362981 (Mich Ct App 2003); and *DiCicco v City of Grosse Poine Woods*, 2002 WL 346126 (Mich Ct App 2002).

[6] Respondent Attorneys also have no answer to Petitioner Judges' arguments based on the nature and effect of "judgments" under MCR 7.215(E)(1). MCR 7.215(B), (C), and (E) are quoted in pertinent part at Petitioner Judges' Brief, pp 43-44, n 29 and related text.

applications for leave are not decisions on the merits. There is no precedential authority supporting Respondent Attorneys' arguments to the contrary.

Respondent Attorneys have abandoned their earlier reliance (see Brief Opp Pet at 7-8) on federal authority in the habeas corpus context, no doubt in recognition that *McKenzie v Smith*, 326 F 3d 721, 726-727 (6th Cir., 2003) considered and explicitly rejected such arguments. See Petitioner Judges' brief, pp 44-46.

For the reasons explained in Petitioner Judges' brief, since orders of the Michigan Court of Appeals denying applications for leave to appeal are not decisions on the merits, such applications are subject to the principle of *Ross v Moffitt*, 417 US 600 (1974) and not *Douglas v California*, 372 US 353 (1963). The constitution does not require appointed appellate counsel for such applications.

B. Defendants Who Plead Guilty Have Adequate Opportunity To Present Their Claims Fairly.

Respondent Attorneys contend, Brief, pp 38-39, that even indigent defendants convicted on guilty pleas can have complex issues, and that the process of applications for leave to appeal cannot result in a meaningful appeal without appointed counsel. Their argument is again based on their incorrect premise that a *pro se* defendant "would have to litigate" the merits of their issues. Under the Michigan procedures, the merits of the issues are not considered at the app'ication stage,

and under the statute, if an application is granted and the merits are considered, appellate counsel must be appointed. MCL 770.3a(2)(c).[7] Most appeals from plea-based convictions, however, involve some sort of challenge to sentencing, the Respondent Attorneys' argument ignores the fact that sentencing challenges require a timely objection at trial, when the defendant will have appointed trial counsel, or else they cannot be raised on appeal. MCL 769.34(10).[8] Since the indigent defendant will have the trial attorney's work product and a transcript of the proceedings, he will have all the necessary tools to complete the form provided by the State Court Administrative Office (Pet App 160a-170a) and present his claims fairly.

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[7] Respondent Attorneys' contention that guilty plea appeals have a considerable success rate is ill-founded. It is impossible to tell what the success rate of such appeals might be, because no official statistics exist. The Michigan Court of Appeals does not keep official statistics on reversal rates of any class of cases, including guilty plea appeals that have passed the threshold of an application for leave to appeal and are considered on the merits. Respondent Attorneys cite (Brief, p 40) a law student Note that refers to a Michigan House Legislative Analysis Section report (that is not an official record of legislative history) on a proposed constitutional amendment in 1994. That report refers to two self-serving communications received from appellate defender organizations giving their own widely disparate estimates of their success rate, but they can in no way be considered authoritative.

[8] MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

All convicted defendants also have available procedures for seeking post-appeal relief from convictions. MCR 7.501 *et seq*. This procedure permits review even of grounds that were not raised in direct appeal, including claims of ineffective assistance of counsel, if there is good cause for failing to raise them earlier, and actual prejudice. MCR 7.508(3). Counsel may be appointed in such proceedings and *must* be appointed if the trial court directs that oral argument or any evidentiary hearing be held. MCR 6.505(A).

As demonstrated in Petitioner Judges' brief, the Michigan procedures give defendants who plead guilty adequate opportunity to present their claims fairly and receive a meaningful appeal without appointed appellate counsel. That is all the Constitution requires.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE, and JUDGE LYNDA L. HEATHSCOTT,

Petitioners,

JUDGE DENNIS C. KOLENDA,

Respondent,

—v.—

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, and MICHAEL D. VOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL ARGUMENT

Respondents file this Supplemental Brief in order to address the August 27, 2004, published decision of the United States Court of Appeals for the Sixth Circuit in *Abela v. Martin*, ___ F.3d ___, 2004 WL 1906171 (6th Cir. 2004).

Respondents have maintained throughout this litigation that an order of the Michigan Court of Appeals denying an application for leave to appeal "for lack of merit in the grounds presented" is, in fact, a decision on the merits of the appeal. *See* Respondents' Brief at 30-31 (citing three published and four unpublished decisions of the Michigan Court of Appeals each holding that an order denying an application for leave to appeal "for lack of merit in the grounds presented" is a conclusive determination of the merits of the issues raised in the application). Petitioners claim, however, that an order denying leave to appeal for lack of merit in the grounds presented is not a decision on the merits. *See* Petitioners' Brief at 39-46, Reply Brief at 15-18. In support of this proposition, Petitioners have cited, *inter alia*, the decision of the Sixth Circuit in *McKenzie v. Smith*, 326 F.3d 721, 726-727 (6th Cir. 2003). Reply Brief at 44-46. As Respondents have already demonstrated, *see* Respondents' Brief at 31, not one of the cases cited by Petitioners can fairly be read to hold or even state that an order denying an application for leave to appeal "for lack of merit in the grounds presented" is anything other than a decision on the merits. Indeed, the phrase "lack of merit in the grounds presented" never even appears in *McKenzie* or in any of the other cases cited by Petitioners.

In *Abela*, the Sixth Circuit directly and unambiguously confirmed that a Michigan Court of Appeals' order denying an application for leave to appeal for "lack of merit in the grounds presented" is a decision on the merits for habeas corpus purposes:

> In our case, the last reasoned state court judgment before the Michigan Supreme Court's order—which was the Michigan Court of Appeals' decision denying leave to appeal—*was a merits determination.* The Court of Appeals stated that the motion was "DENIED *for lack of merit in the grounds presented.*" Similarly, the trial court had previously denied the motion for post-conviction relief "for lack of merit on the grounds presented." In short, unlike in *Simpson* [*v. Jones*, 238 F.3d 399 (6th Cir. 2000)] and *Burroughs* [*v. Makowski*, 282 F.3d 410 (6th Cir. 2002)], the state courts below the supreme court never invoked a procedural bar here, but rather repeatedly *ruled on the merits*.

Abela, slip op. at 11-12 (emphasis added, citations omitted). *See also id.* at 12 ("all of the lower state courts adjudicated Abela's case on the merits"). This portion of *Abela* was unanimous. *See id.* at 26 (Siler, J., concurring in "all of the conclusions by the majority" except Fifth Amendment issue).

In short, the Sixth Circuit, the federal appeals court that regularly reviews habeas petitions from Michigan prisoners whose applications for leave to appeal to the Michigan Court of Appeals have been denied "for lack of merit in the grounds presented," squarely held in *Abela* that such orders are decisions on the merits.

CONCLUSION

For the reasons set forth in Respondents' Brief, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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No. 03-407

IN THE

Supreme Court of the United States

JOHN F. KOWALSKI, JUDGE, 26TH JUDICIAL CIRCUIT COURT OF MICHIGAN, ET AL.,
Petitioners,

v.

JOHN C. TESMER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Under Michigan law, a defendant who has been convicted of a criminal offense after pleading guilty and who wishes to appeal from his conviction or sentence must obtain leave of court to appeal. Mich. Const. art. I, § 20. Michigan law broadly restricts, and in many cases prohibits, the appointment of counsel for indigent defendants applying for leave to appeal. If leave to appeal is granted, then counsel will be appointed for an indigent appellant. Mich. Comp. Laws § 770.3a.

In this brief, the American Bar Association addresses the following question:

Whether Michigan's restrictions on appointment of appellate counsel for indigent criminal defendants who have pleaded guilty and who, under state law, must apply for leave to appeal from a conviction or sentence comport with the requirements of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE .....

SUMMARY OF ARGUMENT .....

ARGUMENT .....

ANY INDIGENT CRIMINAL DEFENDANT WHO SEEKS TO PURSUE A FIRST APPEAL SHOULD HAVE APPOINTED COUNSEL, EVEN IF THAT DEFENDANT HAS PLEADED GUILTY AND MUST OBTAIN LEAVE TO APPEAL .....

A. Without The Assistance Of Counsel, An Indigent Defendant Who Wishes To Pursue A First Appeal Will Be Seriously Disadvantaged .....

B. There Is No Basis For Denying Assistance Of Counsel To Indigent Defendants Seeking Leave To Appeal Convictions Based On Guilty Pleas .....

C. Michigan's Interests In Discouraging Meritless Appeals And Reducing Appellate Backlog Are Insufficient To Sustain The Challenged Statute .....

CONCLUSION .....

TABLE OF AUTHORITIES

CASES

Page(s)

Alabama v. *Smith*, 490 U.S. 794 (1989) 9
Anders v. *California*, 386 U.S. 738 (1967) 22
Anderson v. *Harless*, 459 U.S. 4 (1982) 11, 16
Baldwin v. *Reese*, 124 S. Ct. 1347 (2004) 11
Booth Newspapers v. *University of Michigan Boarde of Regents*, 507 N.W.2d 422 (Mich. 1993) 13
Bousley v. *United States*, 523 U.S. 614 (1998) 9, 10, 18
Boykin v. *Alabama*, 395 U.S. 238 (1969) 11
Douglas v. *California*, 372 U.S. 353 (1963) 12, 14, 21
Estelle v. *Williams*, 425 U.S. 501 (1976) 3
Evitts v. *Lucey*, 469 U.S. 387 (1985) 8, 10
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 7, 8
Gray v. *Netherland*, 518 U.S. 152 (1996) 11
Henderson v. *Morgan*, 426 U.S. 637 (1976) 10, 11
Holland v. *Illinois*, 493 U.S. 474 (1990) 11
Illinois v. *Gates*, 462 U.S. 213 (1983) 13
In re Guilty Plea Cases, 235 N.W.2d 132 (Mich. 1975) 15
Jones v. *Barnes*, 463 U.S. 745 (1983) 14, 22
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 3
McMann v. *Richardson*, 397 U.S. 759 (1970) 15
People v. *Babcock*, 666 N.W.2d 231 (Mich. 2003) 19
People v. *Conway*, No. 246026, 2004 WL 787179 (Mich. Ct. App. Apr. 13, 2004) 16
People v. *Cook*, No. 245018, 2004 WL 576251 (Mich. Ct. App. Mar. 23, 2004) 20
People v. *Dupuis*, Nos. 239315, 239316, 2003 WL 22956389 (Mich. Ct. App. Dec. 16, 2003) 17
People v. *Duty*, No. 241759, 2003 WL 22871279 (Mich. Ct. App. Dec. 4, 2003) 17
People v. *Hedgwood*, 636 N.W.2d 127 (Mich. 2001) 15
People v. *Ingram*, 484 N.W.2d 241 (Mich. 1992) 18

TABLE OF AUTHORITIES—Continued

Page(s)

People v. *Kimble*, 651 N.W.2d 798 (Mich. Ct. App. 2002), *leave to appeal granted*, 659 N.W.2d 231 (Mich. 2003) 16
People v. *Miller*, 604 N.W.2d 781 (Mich. Ct. App. 1999) 9
People v. *Miller*, No. 240613, 2003 WL 22442992 (Mich. Ct. App. Oct. 28, 2003) 15, 17, 20
People v. *Reed*, 499 N.W.2d 441 (Mich. Ct. App. 1993) 9
People v. *Rostick*, No. 241916, 2004 WL 67551 (Mich. Ct. App. Jan. 15, 2004) 15
People v. *Scott*, No. 243418, 2004 WL 405919 (Mich. Ct. App. Mar. 4, 2004) 16
People v. *Ward*, 594 N.W.2d 47 (Mich. 1999) 18
People v. *Wilson*, 652 N.W.2d 488 (Mich. Ct. App. 2002) 17
Powell v. *Alabama*, 287 U.S. 45 (1932) 7
Powers v. *Ohio*, 499 U.S. 400 (1991) 11
Ross v. *Moffitt*, 417 U.S. 600 (1974) 12, 14, 15
Smith v. *Robbins*, 528 U.S. 259 (2000) 22
Tollett v. *Henderson*, 411 U.S. 258 (1973) 15
United States v. *Ash*, 413 U.S. 300 (1973) 8
United States v. *Timmreck*, 441 U.S. 780 (1979) 18
Wiggins v. *Smith*, 123 S. Ct. 2527 (2003) 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Mich. Const. art. I, § 20 i
Mich. Comp. Laws § 769.34(2) 19
Mich. Comp. Laws § 770.3a ..... i, 16
Mich. Comp. Laws § 777.21(1) 19
Mich. Comp. Laws § 777.31 19
Mich. Comp. Laws § 777.51 19
Mich. Comp. Laws § 777.61-777.69 19
MCR 6.429(C) 17
MCR 6.508(D)(3) 9

TABLE OF AUTHORITIES—Continued

Page(s)

MCR 7.205 9
MCR 7.216 22
MCR 7.302(B) 14
Sup. Ct. R. 10 14

MISCELLANEOUS

American Bar Association, *Model Rules of Professional Conduct* 22
American Bar Association, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) 2, 3, 4, 22, 23
Burger, Warren E., *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974) 2
International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171 4

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

ABA has more than 400,000 members, including prosecutors, public defenders, private attorneys, state and federal trial and appellate judges, legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it. In particular, ensuring that all indigent criminal defendants have appointed counsel has been a cornerstone of the ABA's mission, as reflected in its Goal II: "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."

The ABA respectfully submits this brief as amicus curiae because this case implicates matters addressed by the Standards for Criminal Justice promulgated by the ABA. *See generally* American Bar Association, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) (Standards). The Standards have been developed, refined, and approved over more than thirty years by task forces of the ABA made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA. Although the Standards do not purport to set forth the ABA's views on the requirements of the Constitution, they do represent the consensus of an experienced group of prosecutors, defense attorneys, and judges on procedures for a "criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future."[2] The Standards have been widely cited, including by this Court, as a guide to criminal justice administration.[3]

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[2] 1 Standards xx; *see also* Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-252 (1974) ("The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual.").

[3] On several occasions, this Court has found the Standards helpful in ascertaining the proper balance of individual rights and societal interests in the criminal justice system. *See, e.g., Wiggins* v. *Smith*, 123 S. Ct. 2527, 2535-2536 (2003); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

Several of the Standards speak directly to the issue in this case and support the position that all criminal defendants should have counsel on appeal. Most directly, Standard 21-3.2(a), entitled "Counsel on appeal," states:

> At the first level of appeal, every convicted defendant, appellant or appellee, should have assistance of counsel. For persons without means to obtain adequate legal representation, counsel should be assigned unless the right to counsel is explicitly waived. Assigned counsel should be compensated from public funds.

4 Standards at 21.39. The Standards also take the position that denial of appointed counsel on first appeals by indigent defendants represents an unsound deterrent to potentially meritorious appeals. Standard 21-2.3(a), entitled "Unacceptable inducements and deterrents to taking appeals," explains that a system of elective appeals "presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons." 4 Standards at 21.25. Standard 21-2.3(c) gives, as a specific example of an unacceptable deterrent to defendants' appeals, "denial of necessary legal assistance and related services at public expense to appellants who cannot afford adequate legal representation." 4 Standards at 21.26.

More generally, the ABA opposes restrictions on the ability of convicted criminal defendants to pursue a first appeal of right. The Standards take the position that all convicted criminal defendants, including those who have pleaded guilty, should have the right to one appeal from a conviction.[4] Commentary to the Standards observes that in

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[4] *See* Standard 21-1.1(a), 4 Standards at 21.5 ("The possibility of appellate review of trial court judgments should exist for every criminal

Anglo-American law "[t]here is today no dissent from the principle that every convicted defendant should be afforded the opportunity to obtain one judicial review of the conviction by a tribunal other than that in which the defendant was tried." Standard 21-1.1, cmt., 4 Standards at 21.6. That principle is recognized in international law as well. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, ¶ 5, 999 U.N.T.S. 171 ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

Accordingly, the ABA submits this brief in support of the position that a criminal defendant who is required to seek leave to pursue a first appeal from his criminal conviction and who cannot afford appellate counsel should have the assistance of appointed counsel in seeking leave to appeal. Serious problems can arise in the administration of justice when indigent defendants are not assisted by counsel. Those problems are directly implicated in this case. Beyond the obvious harm that would result to indigents who would either have to proceed pro se in seeking leave to appeal or forgo such an opportunity if denied counsel, laws like the Michigan law at issue in this case could have a seriously detrimental effect on the indigent defense system as a whole. Ordinarily, the mere potential for an appeal with counsel acts as an effective check on the conduct of all actors in the criminal justice system at the trial level. Eliminating the appointment of appellate counsel for indigent defendants who plead guilty may therefore disadvantage indigent de-

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conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable."); Standard 21-1.3(a) , 4 Standards at 21.10-21.11 ("A defendant should have the right to appeal from any final judgment of a trial court adverse to the defendant, including: (i) a conviction followed by a sentence of probation; (ii) a conviction followed by a sentence suspended as to imposition or execution: or (iii) a conviction based upon a plea of guilty or nolo contendere."); Standard 21-2.4, 4 Standards at 21.31 ("At the first level of appeal, procedures intended to eliminate frivolous cases from appellate court dockets without decisions on the merits are impractical and unsound.").

fendants at the trial stage as well as the appellate stage. Because the vast majority of convictions in Michigan and elsewhere result from guilty pleas (*see* Pet. Br. 30), these concerns are of pervasive importance to the administration of justice in this country, especially if other States follow Michigan's lead in denying appellate counsel.

SUMMARY OF ARGUMENT

Any criminal defendant who wishes to pursue a first appeal from his conviction or sentence should have the assistance of counsel in doing so if he so wishes. If the defendant cannot afford counsel, he should be appointed counsel on appeal. And an indigent defendant should have appointed counsel on appeal even if he pleaded guilty, and even if he must seek and obtain leave to appeal.

A. The assistance of counsel is indispensable to a defendant pursuing a first appeal from a conviction or sentence. Appeals are complex, specialized undertakings. They are no less forbidding to the layperson than a criminal trial. Appeals typically require compliance with procedures that are unfamiliar to nonlawyers: filing a notice of appeal, ordering transcripts, preparing and filing briefs. Court rules (including those governing Michigan's leave-to-appeal procedure) generally require defendants to identify the factual and legal bases for their appeal. Legal training and skill are needed to identify potentially meritorious claims of error in the record and to ensure that those points of error are properly preserved for appellate review. An unrepresented defendant who fails to discern a point of error, to describe the error properly, or to articulate the correct doctrinal basis for reversal is likely to lose forever any opportunity for reversal of his conviction or sentence.

In important respects, a defendant's first appeal from a criminal conviction (even when leave to appeal is required) is quite different from a discretionary second round of review in a state supreme court, where an indigent defendant does not have a constitutional right to appointed counsel. When a defendant pursues a discretionary second round of review,

similar to certiorari in this Court, he ordinarily will have the benefit of briefs that have been filed on his behalf in the intermediate appellate court. An unrepresented defendant appealing a conviction or sentence will typically not have the benefit of such materials, since many matters are resolved in trial courts without detailed briefing. Moreover, a state supreme court exercising discretionary review can usually determine from the face of the opinion of the lower court whether an issue warrants its review. The same is not true of a court reviewing a defendant's first appeal. Thus, without counsel, a defendant is likely to be adrift on appeal.

B. Michigan's decision to deny appointed appellate counsel to indigent defendants who have pleaded guilty lacks a sound basis. Although the State argues that the practice of denying appointed appellate counsel deters meritless appeals, in fact defendants who plead guilty may well have meritorious claims on appeal. For example, the defendant may have pleaded guilty to an offense without having had the nature of the charge accurately explained to him, or the defendant may not have had effective assistance of counsel in the guilty plea process. Without appointed appellate counsel, it is unlikely that such a defendant could obtain relief.

In addition, the Michigan practice inappropriately hobbles defendants who have pleaded guilty in appeals from their sentences. In Michigan, all defendants, whether they have pleaded guilty or were found guilty after trial, are subject to the same sentencing procedures under the State's sentencing guidelines system. There is no justification for deterring indigent defendants who have pleaded guilty, among all defendants, from appealing if the trial court has made an error in construing or applying the guidelines. Moreover, the Michigan guidelines are complex, and opportunities for error abound. A defendant cannot reasonably be expected to discern and pursue claims of sentencing error without the assistance of counsel.

C. The ABA recognizes that States have a legitimate interest in reducing and preventing appellate backlog, but

the approach chosen by Michigan is neither necessary nor appropriate to that task. The state courts can provide for disposition of particular cases or classes of cases on separate tracks and can use court staff to identify cases to be so treated. The assistance of counsel, however, is not a luxury that can be dispensed with on appeal any more than at trial. It is, rather, an essential part of a fair system of justice.

ARGUMENT

ANY INDIGENT CRIMINAL DEFENDANT WHO SEEKS TO PURSUE A FIRST APPEAL SHOULD HAVE APPOINTED COUNSEL, EVEN IF THAT DEFENDANT HAS PLEADED GUILTY AND MUST OBTAIN LEAVE TO APPEAL

A. Without The Assistance Of Counsel, An Indigent Defendant Who Wishes To Pursue A First Appeal Will Be Seriously Disadvantaged

1. This Court has long recognized the critical need that indigent defendants have for the assistance of counsel in defending themselves against prosecution by the State. In cases applying the Sixth Amendment, which guarantees a defendant the assistance of counsel at trial, this Court has explained that "[t]he right [of a defendant] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); *see also Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). The Court's decisions under the Sixth Amendment reflect "the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system." *United States* v. *Ash*, 413 U.S. 300, 307 (1973).

The same concerns have led this Court to identify a similar right under the Due Process and Equal Protection Clauses to the assistance of counsel on a first appeal. As the Court has observed, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). Recognizing that nonlawyers generally lack the legal skills and training needed to discern the legally and factually promising bases for appeal, the Court has emphasized that "lawyers are 'necessities, not luxuries' in our adversarial system of justice . . . . The defendant's liberty depends on his ability to present his case in the face of 'the intricacies of the law and the advocacy of the public prosecutor.'" *Id.* at 394 (quoting *Gideon*, 372 U.S. at 344, and *Ash*, 413 U.S. at 309).

An unrepresented defendant faces challenges on appeal that are equally as daunting as those at a trial. For example, anyone pursuing an appeal typically must file a notice of appeal in the proper form and in the proper court, designate the record for appeal, order transcripts, and specify the points to be raised on appeal. In addition, in Michigan, a defendant who must apply for leave to appeal must state the factual and legal basis for any claim of error to be raised on appeal, which presumably requires specific references to the record if such claims are to appear meritorious to the reviewing court. *See* Pet. App. 169a-170a. All of this must be done, moreover, within strict deadlines and while the defendant is incarcerated (unless the defendant has obtained bail pending appeal). Moreover, in many cases, the application for leave to appeal may have to be filed before the complete record on appeal will have been prepared. Thus, an indigent defendant cannot assume that the record by itself will be sufficient to allow an appellate court to discern the presence of error. *See* MCR 7.205 (directing that application for leave to appeal be filed within 21 days after judgment, but noting circumstances in which transcript may not yet be available).

Lacking the advice and assistance of counsel, an indigent defendant would be seriously disadvantaged in preparing an application for leave to appeal.[5] For example, a defendant who wished to challenge his guilty plea on the ground that his trial counsel or the trial court had erred in explaining the nature of the charge against him would surely need the assistance of appellate counsel to explain the deficiency, especially if the error involved misconstruction of the elements of the offense. *Cf. Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (guilty plea may be involuntary if court and counsel err in explaining elements of the offense to the defendant). Similarly, a defendant would need the assistance of appellate counsel to understand how to raise a claim of ineffective assistance of trial-level counsel, which under Michigan law must be raised on direct appeal, absent good cause.[6] And if an unrepresented defendant failed to perceive how to challenge a mistake by the trial court in construing and applying the highly technical Michigan sentencing guidelines in his case (*see infra* pp. 18-20), he could well lose

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[5] Indigent defendants also need the advice of counsel in deciding *whether* to appeal. In many cases, it may not be in the defendant's best interest to appeal, but a defendant may not recognize that point without the advice of an attorney. If a defendant succeeds in having his plea or sentence overturned on appeal, he may be subject to a longer sentence after retrial, replea, or resentencing. *See Alabama* v. *Smith*, 490 U.S. 794 (1989). The defendant may not recognize this risk and may not understand that additional, potentially detrimental factors bearing on his sentence may be taken into account on resentencing (such as additional convictions that became final, his record in prison, or errors that were overlooked by the original sentencing court).

[6] *See, e.g., People* v. *Reed*, 499 N.W.2d 441, 444-446 (Mich. Ct. App. 1993). If a defendant fails to recognize and raise a meritorious challenge on appeal—an ineffective-assistance claim or any other challenge—the defendant waives the issue for that appeal and, if good cause or prejudice is lacking, for subsequent postconviction relief too. *See, e.g., People* v. *Miller*, 604 N.W.2d 781, 783 (Mich. Ct. App. 1999) (court will decline review of issue on direct appeal when the issue was not raised in questions presented); MCR 6.508(D)(3) (court may not grant postconviction relief for grounds that could have been raised on appeal, absent good cause and prejudice).

any opportunity to obtain reversal of an erroneous sentence. For similar reasons, this Court has recognized that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts*, 469 U.S. at 393.

An unrepresented defendant's failure to identify the proper doctrinal basis for a federal challenge to his conviction on direct appeal would also foreclose the defendant's ability to pursue that federal claim further, either in this Court on direct review or on federal habeas corpus review.[7] Consider, as an example, a defendant who entered a guilty plea without having been explained the nature of the charge against him, or without having understood the constitutionall rights he was waiving by pleading guilty.[8] That defendant might believe that he had a basis for some kind of challenge to the validity of his guilty plea, but not recognize that his claim implicated the federal Constitution. But to preserve the federal claim, it would be insufficient for the defendant

[7] Michigan requires that a defendant seeking leave to appeal complete a form stating the factual and legal basis for any claim of error. This supposedly "nontechnical and easily understood" (Pet. Br. 37) form informs defendants that they must "[s]tate the issues that you want the Court of Appeals to review, such as how you believe the circuit court erred in accepting your plea or imposing the sentence," and that they must "state the law that supports your position and explain how the law applies to the facts of your case." Pet. App. 169a, 170a. The form, however, does not counsel defendants that they must specify whether their claims arise under state or federal law, or both. An unrepresented defendant might believe that his guilty plea or sentence was invalid, but might not know that his claim implicated both state and federal law. Even if he did have such unexpected legal acuity, the defendant might not understand that he should specify whether his claim arose under state or federal law, or both. In this regard, the form's "nontechnical" nature is a vice rather than a virtue: it does not sufficiently warn defendants that they must carefully identify the precise doctrinal bases for their claims, lest they lose forever the right to pursue those claims.

[8] *See, e.g., Bousley* v. *United States*, 523 U.S. 614, 618 (1998) (holding that guilty plea is not voluntary if defendant does not recognize true nature of charges against him); *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976) (same).

simply to state that his plea was not knowing or voluntary. The defendant would also have to invoke the correct specific provision of the federal Constitution and, indeed, would have to invoke the correct federal doctrine to preserve his challenge.[9]

It is unrealistic to expect an indigent unrepresented defendant to navigate these shoals with sufficient skill to make and to preserve potentially meritorious challenges to his conviction or sentence.[10] The wrong guess about the basis for the defendant's challenge could be catastrophic, for it could bar the defendant from pursuing the most promising avenue for his claim. *Compare Holland* v. *Illinois*, 493 U.S. 474, 478, 487 & n.3 (1990) (rejecting white defendant's claim that use of peremptory challenges to strike black jurors violates "fair cross-section" requirement of Sixth Amendment, and declining to reach equal protection claim, which was deemed waived), *with Powers* v. *Ohio*, 499 U.S. 400 (1991) (sustaining similar claim under Equal Protection Clause).

To be sure, the Michigan courts *might* perceive merit in an unrepresented defendant's application for leave to appeal and appoint counsel for plenary briefing. But the far more

[9] *See Baldwin* v. *Reese*, 124 S. Ct. 1347, 1350-1351 (2004) (mere reference to "ineffective assistance" of "appellate court counsel" in state court filing was insufficient to preserve federal ineffective-assistance claim); *Gray* v. *Netherland*, 518 U.S. 152, 163 (1996) ("We have also indicated that it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court." (internal quotation marks omitted)); *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made . . . ." (citations and internal quotation marks omitted)).

[10] For example, a nonlawyer would likely fail to grasp the distinction between arguing that his guilty plea violated the Due Process Clause of the Fourteenth Amendment because he did not receive adequate notice of the charges against him (*see Henderson* v. *Morgan*, 426 U.S. at 644-646 & n.13) and arguing that his plea violated the Due Process Clause because he did not validly waive his constitutional trial rights (*see Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969)).

likely eventuality is that the unrepresented defendant will fail to make his claim with sufficient clarity and precision, the Michigan courts will overlook claims with potential merit, and those claims will be lost forever. "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

2. *Ross* v. *Moffitt*, 417 U.S. 600 (1974), on which the State and its *amici* rely heavily, is inapposite. In that case, this Court ruled that the Fourteenth Amendment did not require that defendants who had already pursued an appeal of their convictions to an intermediate state court of appeals, in which they had had the assistance of appointed counsel, also be appointed counsel to pursue a petition for further discretionary review either in the state supreme court or in this Court. *See id.* at 610-619.

Petitions for discretionary review to a state supreme court in a three-tier court system (as in Michigan) present entirely different considerations from those raised by first appeals, including first appeals where the defendant must seek leave to appeal. As this Court stressed in *Ross*, a defendant who is seeking a discretionary second or third round of appellate review of his conviction "will have, at the very least, . . . a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." 417 U.S. at 615. Thus, to apprise a state supreme court (such as the Michigan Supreme Court) of the substance of his claims, the defendant could simply reproduce the brief that was filed on his behalf on the first appeal. Indeed, given that the customary practice in state supreme courts, as in this Court, is not to entertain claims of error that were not specifically raised in or decided by the court from which review is sought, a defendant generally could not go beyond what was filed on his behalf in

the intermediate court of appeals or decided by that court on the face of its opinion.[11]

By contrast, when a defendant must seek leave to pursue a first appeal, there often will be no such clean record from the trial court for the appellate court to review. Briefs may well not have been filed in the trial court on the pertinent issues. The State notes (Pet. Br. 36) that, "[u]nless made in open court during a hearing or trial, a motion filed in Michigan courts must be in writing." But as experienced criminal practitioners well know, in the fast-moving pace of criminal trial practice, critical motions often are made in open court rather than in writing. Even when written motions are filed in trial courts, they are often cursory. At a minimum, trial court motions are typically much less developed than appellate briefs, which lawyers ordinarily have several weeks to prepare. In addition, trial courts often make oral findings or observations that go beyond the points directly addressed by parties in their written motions. That is particularly true of sentencing, where the trial court may make findings on issues that were not specifically addressed in the parties' sentencing memoranda, if indeed any were filed.

Thus, unlike an unrepresented defendant who has already had one appeal and who is seeking further review, an unrepresented defendant pursuing a first appeal generally will not have the option of simply relying on what was previously filed by a lawyer on his behalf. A defendant pursuing a first appeal needs the assistance of a lawyer to organize the record, to identify the crucial points in the transcript or written record where the claimed error was committed, and to explain which legal doctrines are implicated by the assignments of error. "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for

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[11] *See Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983); *Booth Newspapers* v. *University of Mich. Bd. of Regents*, 507 N.W.2d 422, 432 & n.23 (Mich. 1993).

review." *Jones* v. *Barnes*, 463 U.S. 745, 752 (1983); *see Douglas*, 372 U.S. at 358 (stressing that an appealing defendant needs "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf").

3. The purposes served by first appeals are also quite different from those served by discretionary review proceedings at a higher level. The central purpose of first appeals is correction of error in individual cases. Although appeals also often serve the useful function of clarifying legal principles, that is not an essential component of appeals, and most appellate courts are familiar with appeals that raise issues of little interest to anyone other than the parties to the case. That is true, moreover, whether or not the first appeal is of right. Even in Michigan's system under which leave to appeal is required for defendants who have pleaded guilty, the defendant need not show, and the court need not conclude, that the issue on appeal is of broad legal significance for leave to be granted.

By contrast, the central purpose of discretionary review in the Michigan Supreme Court, as with review in this Court, is to clarify important legal principles of significant public interest. *See* MCR 7.302(B) (setting forth grounds for leave to appeal to Michigan Supreme Court); *cf.* Sup. Ct. R. 10; *Ross*, 417 U.S. at 615 (discussing similar practice of North Carolina Supreme Court). Especially when lower courts have reached differing conclusions, a state supreme court (and this Court) may grant discretionary review even when the court believes that the lower court's decision is correct. *See id.* at 616-617 ("This Court's review . . . depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). In many cases, a state supreme court exercising this discretionary, law-clarifying function can determine from the face of the lower court's opinion (or from a dissent) whether the legal issues warrant plenary consideration. Thus, this Court observed in *Ross* that, while an attorney would certainly be "helpful" to the defendant in sharpening the issues for discretionary review in a state supreme court (*id.* at 616), counsel's function is not so indispensable as it is on a first appeal, where an unrepresented defendant is likely to be adrift.

B. There Is No Basis For Denying Assistance Of Counsel To Indigent Defendants Seeking Leave To Appeal Convictions Based On Guilty Pleas

1. The State argues that defendants who plead guilty are unlikely to have even potentially meritorious claims for appeal, and so nothing of significance is lost by deterring indigent defendants from appealing by denying them appointed counsel when they seek leave to appeal. The State notes that a guilty plea operates as a waiver of many possible claims of error, including many constitutional claims. *See Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970).

Nonetheless, a defendant who pleads guilty generally can challenge his conviction and sentence on appeal in at least two important circumstances. First, a defendant may claim that the conviction resulted from a defect in the plea process itself—either because the guilty plea was not knowing or voluntary, or because the trial court failed to follow the required procedures for taking a guilty plea. *See In re Guilty Plea Cases*, 235 N.W.2d 132 (Mich. 1975) (outlining circumstances in which failure to adhere to plea procedures requires reversal); *People* v. *Rostick*, No. 241916, 2004 WL 67551 (Mich. Ct. App. Jan. 15, 2004) (per curiam) (reversing conviction based on nolo contendere plea for failure to establish lack of factual basis, after initially denying leave to appeal). Second, in Michigan's sentencing system, which resembles the federal sentencing guidelines system in many respects, a defendant convicted on guilty plea may appeal an error in sentencing, which occurs after the guilty plea is accepted. *See People* v. *Hedgwood*, 636 N.W.2d 127 (Mich. 2001) (per curiam); *People* v. *Miller*, No. 240613, 2003 WL 22442992, at *1-*2 (Mich. Ct. App. Oct. 28, 2003) (per curiam) (finding scoring error and remanding for resentencing in case where defendant pled guilty).

By allowing defendants to press appeals in such circumstances (although they must seek leave to appeal), Michigan law recognizes that defendants who plead guilty may well have meritorious claims of error. Defendants who have pleaded guilty and who can afford retained counsel on appeal will have the assistance of counsel in preparing their applications for leave to appeal. Yet the State denies *indigent* defendants the right to the assistance of counsel in seeking leave to appeal on such grounds. For example, an indigent defendant seeking leave to appeal because his guilty plea was involuntary would not fall within any of the categories of persons for whom counsel may be appointed, even in the court's discretion, for assistance in preparing an application for leave to appeal. And an indigent defendant who has pleaded guilty and seeks leave to appeal a sentencing scoring error placing his sentence above the properly applicable guidelines range would also have no right to counsel, but could only have one appointed in the court's discretion. *See* Mich. Comp. Laws § 770.3a(3).[12] Thus, the indigent defendant, unaided by counsel, would have to prove to the court of appeals that his case was sufficiently meritorious to warrant a plenary appeal and the appointment of counsel.

[12] The court is barred from appointing appellate counsel for a defendant seeking leave to appeal his sentence if the defendant did not properly preserve his sentencing issue for appeal. *See* Mich. Comp. Laws § 770.3a(3). Of course, the question whether a claim of error was properly preserved is itself often not simple. *See, e.g., People* v. *Conway*, No. 246026, 2004 WL 787179, at *2 (Mich. Ct. App. Apr. 13, 2004) (per curiam) (assuming error was preserved in complicated circumstances); *cf. Anderson*, 459 U.S. at 8 (Stevens, J., dissenting) ("Few issues consume as much of the scarce time of federal judges as the question whether a state prisoner adequately exhausted his state remedies before filing a petition for a federal writ of habeas corpus."). A lawyer, familiar with court transcripts, is far more likely to be able to persuade a court that a claim of error was properly preserved than an unrepresented defendant, who may not even have the pertinent transcripts when preparing his application for leave to appeal (*see supra* pp. 8-9).

Moreover, even when a claim has not been preserved in the trial court, Michigan law recognizes that a defendant can obtain appellate relief in two circumstances. First, the defendant can obtain plain-error review. *See People* v. *Kimble*, 651 N.W.2d 798, 802-804 (Mich. Ct. App. 2002), *leave to appeal granted*, 659 N.W.2d 231 (Mich. 2003) (oral argument held Jan. 13, 2004); *People* v. *Scott*, No. 243418, 2004 WL 405919, at *2 (Mich. Ct. App. Mar. 4, 2004) (per curiam) (applying *Kimble* and reviewing for plain error); *People* v. *Duty*, No. 241759, 2003 WL 22871279, at *3-*6 (Mich. Ct. App. Dec. 4, 2003) (per curiam) (same, and remanding for resentencing). Second, the Michigan Court of Appeals has also been willing to review sentencing errors that a defendant failed to properly preserve when the defendant presents the issue in the form of an ineffective-assistance-of-counsel claim. *See, e.g., People* v. *Wilson*, 652 N.W.2d 488, 490 (Mich. Ct. App. 2002) (per curiam) (holding that consideration of the sentencing error was barred by MCR 6.429(C), but nevertheless reviewing an ineffective-assistance-of-counsel claim regarding the same sentencing error); *People* v. *Dupuis*, Nos. 239315, 239316, 2003 WL 22956389, at *3 (Mich. Ct. App. Dec. 16, 2003) (per curiam) (same, and finding ineffective assistance and remanding for resentencing); *Miller*, 2003 WL 22442992, at *1-*2 (same). Without the assistance of counsel, however, a defendant would be seriously disadvantaged in presenting such claims in a persuasive manner. Yet these are the cases where the indigent defendant may need appellate counsel the most—to review the sentencing record and present any previously unpreserved sentencing errors for the first time on appeal.

2. Michigan's determination that indigent defendants who have pleaded guilty should not have the right to assistance of counsel when seeking leave to appeal raises serious concerns about the fair administration of justice. It is particularly troubling that Michigan prohibits appointment of counsel when an indigent defendant seeks leave to persuade an appellate court that his guilty plea was constitutionally defective because it was involuntary or not made with the necessary understanding. An indigent defendant could forever lose the right to relief from even an involuntary guilty plea if he were deterred from seeking leave to appeal because he lacked the right to assistance of counsel, or if he did seek leave to appeal but failed to perceive and preserve the proper doctrinal basis for his appeal.[13]

[13] This Court has held that a defendant who does not properly raise a constitutional challenge to the validity of his guilty plea on direct appeal generally loses the right to raise such a challenge on collateral habeas corpus review (subject only to a very narrow exception if the defendant can

Similarly, a defendant who failed to appeal based on nonconstitutional errors in the guilty plea process—such as the trial judge's failure to establish on the record that there was a proper factual basis for the plea—would forever lose the right to relief from his invalid plea. Michigan follows the rule of *United States* v. *Timmreck*, 441 U.S. 780 (1979), that a nonconstitutional error in the taking of a guilty plea, even if it might provide a basis for reversal on direct appeal, is not cognizable on collateral review (at least absent a showing of a fundamental miscarriage of justice). *See People* v. *Ward*, 594 N.W.2d 47, 51-52 (Mich. 1999) (per curiam); *People* v. *Ingram*, 484 N.W.2d 241, 243 (Mich. 1992). But that is exactly the kind of error that a defendant is likely not to perceive without help from his trial counsel or the trial judge—both of whom are likely to have overlooked the error themselves (or else the error would have been rectified).

Nor is there a sound basis for Michigan's broad restrictions on appointment of counsel when a defendant who has pleaded guilty seeks to appeal an erroneous sentence. The Michigan courts follow a mandatory sentencing guidelines system, similar to that in the federal courts, of which appeals from sentences are a routine and important part. The Michigan guidelines system applies both to defendants who plead guilty and those who are convicted after full trials. There is no particular reason to believe that courts will make fewer sentencing errors in guilty plea cases as a class than in trial cases, and there is certainly no reason to believe that trial courts will make fewer sentencing errors in cases of *indigent* defendants pleading guilty than in cases of nonindigent defendants pleading guilty. Thus, there does not appear to be any justification for deterring indigent defendants who have pleaded guilty—out of the entire class of defendants who are convicted—from appealing from their sentences.[14]

show cause and prejudice for his failure to raise the claim on appeal). *See Bousley*, 523 U.S. at 621-622.

Moreover, the sentencing guidelines system in Michigan is complex—indeed, no less complex than the federal system. Under the Michigan system, a defendant's sentence is determined in the following manner. First, based on the particular offense, the court must "score" the statutorily specified "offense variables" and arrive at an "offense variable level" (which is analogous to the offense level under the federal sentencing guidelines). *See* Mich. Comp. Laws §§ 777.21(1)(a), 777.31. Second, the court must score all of the statutorily specified "prior record variables" to arrive at the defendant's "prior record variable level" (analogous to the criminal history category under the federal sentencing guidelines). *See id.* §§ 777.21(1)(b), 777.51. The court then must consult a sentencing grid applicable to the specific offense class and determine the "minimum sentence range"—but in contrast to the federal system, the Michigan guidelines have numerous sentencing grids, each corresponding to one of nine different offense classes. *See id.* §§ 777.21(1)(c), 777.61-777.69. Finally, the court must impose a sentence within the applicable guidelines range. *See id.* § 769.34(2).[15]

[14] Although a defendant's guilty plea does waive numerous claims of error based on incidents antecedent to the defendant's plea, it does not follow (and this Court has never held) that a guilty plea necessarily waives *any* claim of error arising out of sentencing. Thus, whatever might be said about the effect of a guilty plea in waiving claims of error concerning the defendant's guilt, there is no basis to conclude that such a plea has any significance for a defendant's right to appeal his sentence.

[15] As the Michigan Supreme Court explained in *People* v. *Babcock*, 666 N.W.2d 231, 240-241 (2003):

> Under the guidelines, offense and prior record variables are scored to determine the appropriate sentence range. Offense variables take into account the severity of the criminal offense, while prior record variables take into account the offender's criminal history. Therefore, the appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant's criminal history.

The opportunities for legal and factual error by trial courts in implementation of the Michigan sentencing guidelines are numerous, as the federal courts have discovered in their own, similar system. Even in cases involving guilty pleas, the Michigan trial courts do sometimes misapply the guidelines, requiring the Michigan Court of Appeals to remand cases for resentencing. *See, e.g., People* v. *Cook*, No. 245018, 2004 WL 576251, at *1 (Mich. Ct. App. Mar. 23, 2004) (mem.) (remanding when trial court erroneously sentenced defendant to prison time rather than probation); *Miller*, 2003 WL 22442992, at *1-*2 (remanding because trial counsel rendered ineffective assistance in failing to object to scoring error affecting defendant's sentence). But if the Michigan sentencing guidelines occasionally confound even trial courts, they are hardly likely to be pellucid to indigent, unrepresented defendants. In short, legal skill is necessary to effective comprehension of the system and indispensable to pursuing a successful appeal from a sentencing error. Thus, a defendant who has pleaded guilty and who wishes to appeal his sentence is likely to be seriously disadvantaged if he lacks counsel to prepare his application for leave to appeal.

3. Finally, no state interest suffices to justify a situation, which Michigan has put in place, whereby nonindigent defendants who have pleaded guilty may seek leave to appeal with the assistance of counsel, but indigent defendants may not. There is no basis for believing that indigent defendants as a rule are less likely to have meritorious issues on appeal than nonindigent defendants. For example, there is no reason to believe that indigent defendants are less likely than nonindigent defendants to plead guilty involuntarily or unknowingly, or that trial courts are less likely to commit errors in sentencing indigent defendants than nonindigents. But whereas a defendant who can afford counsel will have expert assistance in (for example) explicating the particular aspect of the sentencing guidelines at issue in the appeal, the indigent defendant will have no such help. "[O]nly the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is

forced to go without a champion on appeal." *Douglas*, 372 U.S. at 356.

As a practical matter, therefore, a defendant who can afford counsel will stand a much better chance of persuading the Michigan courts that his claims of error have sufficient merit that leave to appeal should be granted. Once granted leave to appeal, the defendant with means will then proceed to a plenary appeal, assisted by counsel, whereas the indigent defendant, denied leave to proceed further, will have no appeal. As in *Douglas*, therefore, "the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot." 372 U.S. at 357. Such discrimination is contrary to basic principles of equality and fairness in the Fourteenth Amendment.

C. Michigan's Interests In Discouraging Meritless Appeals And Reducing Appellate Backlog Are Insufficient To Sustain The Challenged Statute

The State argues (Pet. Br. 3) that its practice of requiring defendants who have pleaded guilty to seek leave to appeal is justified by its interests in discouraging meritless appeals and reducing the backlog in its courts of appeals. The issue before the Court in this case, however, is not whether the State may require any particular class of appealing defendants to seek leave to appeal. As a matter of policy, the ABA opposes the leave-to-appeal device as a method of deterring frivolous appeals and reducing appellate caseload (*see supra* pp. 3-4 & n.4), but the propriety of that procedure is not at issue here. Rather, the question is whether indigent defendants are entitled to the assistance of counsel in passing that threshold barrier to their ability to pursue any appeal at all.

If the leave-to-appeal procedure operates as intended, a court that reviews applications for leave to appeal would be assisted, not harmed, by counsel's skill in identifying the issues that would have potential merit on appeal. If a defendant is represented by appointed counsel on an application

for leave to appeal, that counsel will be constrained by ethical and professional norms as well as court rules from seeking leave to pursue meritless issues. *See* ABA Model Rule Prof'l Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); MCR 7.216(C)(1)(a) (authorizing sanctions when "the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal"). Even among nonfrivolous arguments, competent appointed counsel is likely to pursue only the most promising claims on appeal (*see Jones* v. *Barnes*, 463 U.S. at 752-753)—unlike unrepresented appellants, who are unlikely to have the legal skill to sift promising from unpromising arguments. Appointment of counsel therefore *advances* the State's interest in discouraging meritless appeals.[16]

The ABA recognizes that backlog is a serious problem in many state appellate court systems. State courts have tools to address that problem without sacrificing fundamental requirements of a fair system of justice—including the requirement that a criminal defendant have the assistance of counsel on appeal. For example, the Criminal Justice Standards encourage appellate courts "to select, among diverse procedural paths for hearing and submission of cases to the appellate court and for disposition of cases by the court, the path that is most appropriate for each case," Standard 21-3.1(b)(iii), 4 Standards at 21.37, and also recommend that appellate courts use court staff in "evaluating new appeals and recommending to the court the procedural path appropriate

[16] The State may also adopt appropriate procedures that allow appellate counsel to withdraw when counsel perceives no meritorious claims on appeal, while safeguarding the appealing defendant's right to counsel. *See Smith* v. *Robbins*, 528 U.S. 259, 264-265 (2000); *Anders* v. *California*, 386 U.S. 738, 744 (1967).

to each," Standard 21-3.4(c)(1), 4 Standards at 21.47-21.48. Many States also authorize appellate courts to identify cases that are appropriate for decision without oral argument or for summary disposition. If instituted properly, such procedures can ensure that every appealing defendant has the opportunity to make his best claim for reversal and the right to have that claim reviewed. What is not consistent with a fair system of justice, however, is for the State to deny an indigent criminal defendant to undertake the burden of appeal without the help of counsel.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE; AND JUDGE LYNDA L. HEATHSCOTT

Petitioners,

v.

JUDGE DENNIS C. KOLENDA,

Respondent,

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF IOWA, ALABAMA, FLORIDA, HAWAI'I, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Do attorneys have third-party standing on behalf of potential future criminal defendants to challenge, in federal court, a state procedural rule limiting the right to court-appointed appellate counsel, where *Younger* abstention bars a federal-court challenge by the defendants themselves?

2. Does the Fourteenth Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea, even when other state procedures ensure a knowing and intelligent waiver of appellate counsel?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
STATEMENT OF FACTS	3
ARGUMENT	3
I. CRIMINAL DEFENSE ATTORNEYS LACK THIRD-PARTY STANDING TO BRING CLAIMS ON BEHALF OF THEIR POTENTIAL FUTURE CLIENTS, ESPECIALLY WHEN SUCH STANDING WILL ALLOW AN END-RUN AROUND RULES DESIGNED TO GIVE STATE COURTS BREATHING SPACE	3
A. An Attorney-Litigant Cannot Establish Standing To Challenge A State Law Based On The Alleged Violation Of A Potential Future Client's Constitutional Rights	4
B. Third-Party Standing Cannot Be Based On The Delay Potentially Occasioned By *Younger* Abstention	9
II. BECAUSE RESPONDENTS CANNOT SHOW THAT THE MICHIGAN STATUTE IS UNCONSTITUTIONAL IN ALL OF ITS APPLICATIONS, THEIR FACIAL CHALLENGE NECESSARILY FAILS	13

TABLE OF CONTENTS—continued

	Page
A. The Sixth Circuit Ignored The Settled Principle That A Criminal Defendant May Waive His Right To Counsel As Long As He Does So Knowingly, Intelligently, And Voluntarily	15
B. Michigan Court Rules Ensure That A Guilty Plea Will Ordinarily Constitute A Knowing And Intelligent Waiver Of A Defendant's Right, If Any, To Appellate Counsel	17
C. A Rule Requiring A Waiver Of Constitutional Rights As A Condition Of Some Other Privilege Cannot Be Facially Unconstitutional Where, As Here, There Is A Reasonable Likelihood That Some Such Waivers Will Be Knowing And Intelligent	18
CONCLUSION	21

TABLE OF AUTHORITIES

CASES

	Page
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942)	2, 3, 15
Barrows v. *Jackson*, 346 U.S. 249 (1953)	4
Boykin v. *Alabama*, 395 U.S. 238 (1969)	16, 17
Brady v. *United States*, 397 U.S. 742 (1970)	17, 18, 19
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989)	5, 8
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977)	11
Craig v. *Boren*, 429 U.S. 190 (1976)	5, 9, 11
Diamond v. *Charles*, 476 U.S. 54 (1986)	2, 4, 6, 7
Doe v. *Bolton*, 410 U.S. 179 (1973)	5
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	11
Huffman v. *Pursue, Ltd.*, 420 U.S. 592 (1975)	12
Iowa v. *Tovar*, 124 S.Ct. 1379 (2004)	16
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	14, 15, 18, 19
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	2, 5, 8
McKane v. *Durston*, 153 U.S. 684 (1894)	13, 20
Miller v. *Albright*, 523 U.S. 420 (1998)	5, 9
NAACP v. *Alabama ex. rel. Patterson*, 357 U.S. 449 (1958)	11
Powers v. *Ohio*, 499 U.S. 400 (1991)	4, 8, 9
Secretary of Md. v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984)	6
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)	5
Singleton v. *Wulff*, 428 U.S. 106 (1976)	4, 6, 7, 9, 11
Tesmer v. *Granholm*, 333 F.3d 683 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 1144 (2004)	10, 11
United States v. *Hays*, 515 U.S. 737 (1995)	5
United States v. *Ruiz*, 536 U.S. 622 (2002)	15, 16
United States v. *Salerno*, 481 U.S. 739 (1987)	2, 3, 14, 18

TABLE OF AUTHORITIES-continued

	Page
United States v. *Timmreck*, 441 U.S. 780 (1979)....	2, 19
United States Dep't of Labor v. *Triplett*, 494 U.S. 715 (1990).....	4, 8
Warth v. *Seldin*, 422 U.S. 490 (1975)	4
Whitmore v. *Arkansas*, 495 U.S. 149 (1990).....	6
Wyoming v. *Oklahoma*, 502 U.S. 437 (1992)	5
Younger v. *Harris*, 401 U.S. 37 (1971).....	3, 9, 10

STATUTES, CONSTITUTION AND RULE

28 U.S.C. § 2254	10
Mich. Const. of 1963, art. I, § 20	20
Mich. Comp. Laws Ann. § 770.3a	14, 20
Mich. Ct. R. 6.302(B).....	14, 17

INTERESTS OF *AMICI CURIAE*

This case raises fundamental questions about the States' ability to organize and order their criminal justice systems as their citizens think best, free from unreasonable—and premature—interference by federal courts. *Amici* States therefore have a strong interest in both of the questions presented in this case, as the Sixth Circuit's ruling on each issue poses a threat to that fundamental aspect of state sovereignty.

As to the preliminary question posed by the Sixth Circuit's ruling, *amici* States have a strong interest in whether and under what circumstances an attorney, acting in his own right, has third-party standing to challenge a State's rules of criminal procedure on behalf of criminal defendants the attorney *might* represent at some point in the future. The Sixth Circuit's ruling that criminal-defense attorneys have third-party standing to assert such challenges poses a substantial threat to various federalism doctrines, such as *Younger* abstention, that are designed to provide breathing space to the States. Indeed, *amici* believe that the Sixth Circuit's ruling will make *Younger* abstention meaningless because, even if federal courts abstain from considering claims brought by criminal defendants themselves, those same courts will grant third-party standing to attorneys to litigate the same issues.

Amici have an equally strong interest in the merits of the constitutional question presented, which is, at bottom, whether a rule of criminal procedure that conditions a guilty plea on a criminal defendant's agreement to waive certain post-conviction procedural rights can be held facially unconstitutional. Although none of the *amici* have adopted rules like the specific Michigan rule at issue here, these States have an interest in the broader constitutional question of what measures they may take in furtherance of their strong interest in the finality of guilty pleas, and the related question of when

those measures may be subject to a facial challenge. See *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). The Sixth Circuit's ruling undermines the States' interest in finality. At the same time, it substantially erodes two settled principles: first, that a criminal defendant can waive his constitutional rights so long as he does so with his "eyes open" (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)), and second, that a law can be held facially unconstitutional only when it is incapable of being applied in a constitutional manner. *E.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). These precedents have enormous practical implications for the administration of *amici*'s criminal justice systems.

SUMMARY OF ARGUMENT

I. The Sixth Circuit erred in conferring third-party standing on respondents. First, respondents failed to demonstrate that they have a personal interest in this case sufficient to satisfy the case or controversy requirement of Article III. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion); see also *Diamond* v. *Charles*, 476 U.S. 54, 66-67 (1986). Respondents alleged neither that they were facing an imminent enforcement action nor that Michigan's rules of procedure impinged upon their constitutional rights. Instead, respondents assert only that they stand to lose business because of Michigan's rule against appointing counsel to assist in challenging judgments entered after a guilty plea. This Court previously has held that such a speculative allegation of harm based upon potential loss of business is insufficient to satisfy the "injury in fact" requirement for third-party standing. *Diamond*, 476 U.S. at 66-67.

Even if respondents had demonstrated an "injury in fact," however, they would not be entitled to third-party standing to allege violations of the rights of criminal defendants where *Younger* v. *Harris* stands as the only obstacle to criminal defendants raising these claims themselves. *Younger* requires

only that federal courts refuse to interfere with *ongoing* state-court criminal prosecutions. 401 U.S. 37, 41 (1971). *Younger* is thus not a complete bar to review; it merely affects the timing of such review. Allowing attorneys to institute an action under the guise of third-party standing, therefore, would eviscerate *Younger*.

II. The Sixth Circuit likewise erred in concluding that the Michigan rule is facially unconstitutional. Leaving aside the question whether criminal defendants have a constitutional right to appointed counsel to aid in the filing of a petition for leave to appeal (which they do not, as Michigan correctly argues), other Michigan rules require that criminal defendants be fully informed that they are waiving all such rights when they plead guilty. Accordingly, a defendant who pleads guilty will ordinarily have effected a knowing and intelligent waiver of any constitutional right he might otherwise have enjoyed. See *Adams*, 317 U.S. at 279. Respondents therefore cannot possibly show, as they must to succeed in their facial challenge, that there are *no* circumstances in which the Michigan rule would be constitutional. *Salerno*, 481 U.S. at 745.

STATEMENT OF FACTS

Amici adopt the statement of facts in petitioner's brief.

ARGUMENT

I. CRIMINAL DEFENSE ATTORNEYS LACK THIRD-PARTY STANDING TO BRING CLAIMS ON BEHALF OF THEIR POTENTIAL FUTURE CLIENTS, ESPECIALLY WHEN SUCH STANDING WILL ALLOW AN END-RUN AROUND RULES DESIGNED TO GIVE STATE COURTS BREATHING SPACE.

The Sixth Circuit erred in finding that the criminal defense attorney respondents have third-party standing. As a general

rule, a litigant lacks standing to assert the rights of others. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) (plurality opinion). And federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton* v. *Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion); see also *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[A plaintiff] must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 62 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Thus, a plaintiff bears a heavy burden when attempting to litigate the rights of others.

In those rare instances in which this Court has allowed such "third-party standing," the Court has imposed a three-part test: (1) "[t]he litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). All "three important criteria [must be] satisfied" for a litigant to possess third-party standing. *Id.* Here, respondents have failed to satisfy even one of these three requirements.

A. An Attorney-Litigant Cannot Establish Standing To Challenge A State Law Based On The Alleged Violation Of A Potential Future Client's Constitutional Rights.

As an initial matter, respondents cannot establish the requisite injury in fact. The doctrine of third-party standing does not alter the basic rule that federal courts are empowered

to act only in cases or controversies. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3 (1989). "It is axiomatic that a litigant first must clearly demonstrate that he has suffered an injury in fact in order to assert Article III standing to sue." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 465 (1992) (internal quotations omitted).

Injury in fact, moreover, must be "actual or imminent, *not conjectural or hypothetical*." *United States* v. *Hays*, 515 U.S. at 743 (emphasis added); see also *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power"). It must also be concrete. As this Court put it in *Lujan*, an injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 560 (internal quotations and citations omitted).

Lujan's requirement of concrete injury has been imported into the first two prongs of the third-party standing test, which require the litigant to demonstrate a present, real interest in this case rather than a mere conjectural or hypothetical loss of a future potential client. Thus, this Court has conferred third-party standing *only* when the litigant either faces an enforcement action, see, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973) (conferring standing on a doctor that performed abortions due to threat of criminal prosecution); *Craig* v. *Boren*, 429 U.S. 190 (1976) (conferring standing on a beer seller due to the threat of criminal prosecution), alleges violation of his own constitutional rights as well as the rights of the third-party, see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420, 433 (1998) (plurality opinion) (Stevens, J.) (conferring standing on a child to challenge a law denying her citizenship based upon the law's violation of her rights and her father's rights to equal protection of the law), or alleges that the violation of the rights of a current client has caused it economic harm. See, *e.g.*, *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1990) (conferring third-party

standing on law firm to assert that the government's forfeiture order, which left client unable to pay its legal bills, violated its client's rights).[1]

1. As to the first prong of the third-party standing test: it is well settled that third-party standing is not appropriately conferred when the litigant's claim of "injury in fact" is based upon the possible occurrence of multiple contingencies. See *Diamond* v. *Charles*, 476 U.S. 54 (1986); see also *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (collecting cases holding that speculative future injury will not satisfy injury in fact). Indeed, this Court has expressly rejected an argument for third-party standing based upon an assertion of potential loss of a future client.

In *Diamond*, the Court rejected the argument that a pediatrician could meet the "injury in fact" requirement merely by alleging possible future pecuniary harm from higher rates of abortions. 476 U.S. at 66. In that case, Illinois had opted not to defend one of its statutes that interfered with the right to abortion. *Id.* at 61. Mr. Diamond, a pediatrician, had been allowed to intervene in the case below to defend the constitutionality of the Illinois provision. *Id.* at 57-58. He claimed an interest in the litigation based upon the fact that should the laws in question be struck down, abortion would increase, and thus fewer children would be born, which would, in turn, cause the pool of persons seeking his services to shrink. *Id.* at 66. This Court found that such a speculative claim of "injury in fact," based upon numerous future contingencies, was insufficient to allow third-party standing. *Id.*[2]

[1] This Court has also recognized that the third-party standing rules should be more liberally applied in cases alleging violations of the First Amendment, *see, e.g.*, *Secretary of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), but this rule clearly does not apply in this case.

[2] *Singleton* v. *Wulff*, 428 U.S. 106 (1976), is not to the contrary. In that case, this Court held that abortion doctors, asserting a woman's constitutional right to an abortion, could sue for loss of Medicaid reimbursement for abortions they performed. Although this case appears at first blush to stand for the proposition that third-party standing can arise based upon a future economic interest, this is actually not the case for two reasons. First, a majority of the Court did not find that economic harm is sufficient to confer standing. Four justices found third-party standing based upon the doctor's economic interests, while Justice Stevens found that the doctor's own constitutional rights were implicated. *Id.* at 121-22 (Stevens, J. concurring in part). But even if the plurality opinion were controlling, not only did the doctors face the future loss of income, they were being denied payments owed to them for abortions already performed. *Id.* at 109; *id.* at 113. These doctors, then, had a *present* economic interest in the litigation, and *Singleton* therefore does not speak to the question of whether a purely *future* potential economic loss is sufficient to establish third-party standing.

In this case, respondents' claimed injury is as speculative and hypothetical as the injury alleged in *Diamond*. These attorneys face no threat of criminal or civil enforcement; indeed, they have never alleged such a threat. The only consequence of the statute is that, if they should choose to represent the defendants affected by the statute, the attorneys would not be paid—i.e., these attorneys might lose potential future income. Respondents claim that the Michigan statute harms them because "it will reduce the number of cases in which they could be appointed and paid as assigned appellate counsel." Joint App. 16a (Complaint ¶ 36). That is, the respondents aver that the effect of the statute is to reduce the pool of persons seeking their services. This is precisely the type of future economic interest that this Court concluded was insufficient in *Diamond*. See 476 U.S. at 66. Thus, *Diamond* forecloses the argument that respondents have made here.

But even if respondents' argument were not expressly foreclosed by *Diamond*, it proves too much. If respondents can assert standing in this case based merely upon an allegation that the Michigan statute could lead to a decrease in their future business, then attorneys (and other professionals) could challenge *any* enactment that might reduce their future business. Such a result would render *Lujan*'s statement that plaintiffs must establish a concrete rather than conjectural

injury meaningless. See 504 U.S. at 560. Individuals would be empowered to bring cases, relying upon third-party standing, based upon tenuous chains of potential consequences. This result cannot be reconciled with this Court's precedents, which hold that third-party standing should be conferred only in a select few cases.

2. That respondents have failed to demonstrate a concrete injury is bolstered by the fact that they cannot demonstrate a "close relationship" with the criminal defendants whose rights they wish to vindicate. See *Powers*, 499 U.S. at 411 (stating that third-party standing is appropriate only when a party has demonstrated a "close relation" with the aggrieved party). Respondents cannot demonstrate a sufficient relationship in this case because they do not have an existing relationship with the criminal defendants. They rely on nothing more than a hope of a relationship with these individuals.

In cases where plaintiffs have been allowed to assert third-party standing based upon a loss of business alone (i.e., when there is not a threatened enforcement action), they have without exception complained that the violation of the rights of their *current* clients will cause them economic harm. See, *e.g.*, *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990) (attorney asserting the rights of his current clients); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1990) (attorney asserting the rights of his client). In these cases, the plaintiffs established a "close relation" with the aggrieved party by pointing to the existing relationship.

Here, by contrast, the attorneys are trying to place the cart before the horse. Though respondents are members of the defense bar and are certified to be appointed counsel, they have no relationship with any defendants affected by the Michigan statute. They were not counsel to any of the plaintiff criminal defendants, nor have the attorneys demonstrated they have been retained by any other defendants that the statute would putatively effect. Because respondents do not have an existing relationship with any individuals

currently denied counsel under Michigan's rules, they cannot allege a concrete injury. Their injury is simply a hypothetical future injury.[3] This alone makes third-party standing inappropriate here.

B. Third-Party Standing Cannot Be Based On The Delay Potentially Occasioned By *Younger* Abstention.

The third condition that must be satisfied to grant third-party standing is that there must be a "genuine obstacle" hindering the party whose rights are being asserted from asserting their own rights. *Powers*, 499 U.S. at 411; *Singleton*, 428 U.S. at 116. While there is certainly room for disagreement over how significant the obstacle must be, it is simply not reasonable to find a genuine obstacle based upon *Younger* abstention. See *Younger*, 401 U.S. at 41-46; see also *Miller*, 523 U.S. at 455 n.1 (Scalia, J. concurring in judgment) ("Our law on this subject is in need of what may charitably be called clarification"). *Younger* abstention—a doctrine created specifically to keep the federal courts out of disputes that are best handled, in the first instance, by state courts—does not

[3] In cases where this Court has recognized third-party standing on the basis of a threatened enforcement action, it has relaxed the necessity of finding an existing relationship. In *Craig*, 429 U.S. at 195, for example, this Court found that a beer vendor had standing to challenge a statute that prohibited the sale of beer to certain classes of people, though it appeared that no relationship existed between the beer seller and her potential clients. This holding appears largely based upon the notion that a pending enforcement action against the beer seller created a sufficient relationship between the buyer and seller. *Id.* ("[T]he threatened imposition of governmental sanctions might deter appellant . . . from selling 3.2% beer to young males, thereby ensuring that 'enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of the third parties' rights.'") (alteration in original). At any rate, *Craig* preceded *Powers*'s articulation of the three part test for third-party standing, and it is not clear what generalization can be drawn from *Craig*. *See Miller*, 523 U.S. at 447 (O'Connor, J. concurring in judgment) (questioning the ability to generalize from *Craig* after the Court's decision in *Powers*).

prevent state criminal defendants from raising their claims in federal court, it merely requires them to exhaust their state court proceedings first. Granting third-party standing in this case would make *Younger* abstention useless, and this Court should not accept such an end-run around such an important doctrine.

Specifically, *Younger* recognized that state courts should have the right "to try state cases free from interference of the federal courts." 401 U.S. at 43. Thus, *Younger* prevents litigants who have not concluded their state proceedings from resorting to the federal courts for relief. *Id.* at 45. *Younger* was based upon this Court's understanding that the states have important interests in administering their criminal justice systems without interference from the federal government. *Id.* at 43-45.

At the same time, however, *Younger* abstention does not stand as a permanent bar; it merely precludes a state criminal defendant from bringing a federal court action while his state-court case is pending. See *id.* *Younger*, moreover, does not preclude criminal defendants from seeking Supreme Court review of their convictions. And once a conviction becomes final, the doors to the federal courthouse open via a federal habeas corpus proceeding. See 28 U.S.C. § 2254.

In this case, the criminal defendants who initially were parties to this suit were barred from raising their claims because of *Younger* abstention. The Sixth Circuit held, correctly, that the criminal defendants were required to exhaust their state remedies—a requirement they had not yet met—and therefore should have been dismissed. *Tesmer* v. *Granholm*, 333 F.3d 683, 690-91 (6th Cir. 2003) (en banc). The Sixth Circuit then correctly noted that "[o]ur conclusion that the district court should have abstained does not foreclose any appeal by the indigents. Once state proceedings are concluded, a litigant may choose to pursue a constitutional

claim in a federal forum, and the federal court may choose to exercise jurisdiction." *Id.* at 690.[4]

Younger, then, merely limits the time within which a state criminal defendant may bring a federal court action. Thus, *Younger* cannot be considered a "genuine obstacle" because it is not a total bar against litigants ever bringing suit in federal court. Where this Court has found that a "genuine obstacle" exists, it has been a permanent obstacle, not a transitory one. See, *e.g.*, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 684 n.4 (1977) (privacy concerns relating to abortions); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446 (1972) (privacy concerns regarding contraception); *NAACP* v. *Alabama ex. rel. Patterson*, 357 U.S. 449, 459 (1958) (privacy concerns of NAACP members); *Singleton*, 428 U.S. at 108 (imminent mootness prevents the right-holder pregnant women from bringing suit); *Craig*, 429 U.S. at 192 (named plaintiff turned 21 mooting his own claim). Indeed, this Court has never concluded that a mere exhaustion requirement constitutes a "genuine obstacle" for purposes of third-party standing. Because all that is required in the present case is for the criminal defendants to first proceed through the state courts, there is no "genuine obstacle" and therefore no need to confer third-party standing on respondents to vindicate the alleged right.

Moreover, a conclusion that *Younger* abstention constitutes a "genuine obstacle" would wholly undermine the purpose of *Younger*. *Younger* teaches that litigants must wait to file suit in federal court until the conclusion of state-court criminal proceedings, and that such a delay will not damage their underlying substantive rights. In fact, where delay could damage the underlying substantive rights of the criminal defendants, this Court has carved out an exception to

[4] The same analysis will hold for any future criminal defendants—i.e., those who might be the potential, future clients of the attorney-litigants. These future criminal defendant will not be allowed to bring suits in federal court until they have exhausted their remedies in state court.

Younger. See *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("*Younger*, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'"). Here, by contrast, respondents do not assert that delay will make it impossible for the federal courts to vindicate the rights of the criminal defendants. They simply wish to make an end-run around *Younger*'s requirement that criminal defendants exhaust their state-court proceedings before filing suit in federal court. Indeed, respondents argue that because *Younger* abstention bars the criminal defendants from making their claims now, their potential attorneys should be allowed to assert these claims via third-party standing—a position that truly turns *Younger* on its head. In short, a conclusion that Younger abstention constitutes a "genuine obstacle" would render *Younger* meaningless because defendants could achieve through third-party standing what they cannot achieve directly.

But the implications of a decision in respondents' favor are not limited to the evisceration of *Younger*. Allowing the *Younger* doctrine to be deemed a "genuine obstacle" would obviate the effectiveness of *any* prudential rule that the federal courts or Congress has adopted to allow state courts to consider the validity of their prosecutions in the first instance. A ruling for respondents would, for example, eviscerate the exhaustion requirement of habeas corpus proceedings. A litigant wishing to avoid the delay of state post-conviction proceedings could simply enlist an attorney to file a case alleging third-party standing in the federal courts. If *Younger* abstention suffices as a "genuine obstacle" then why would not the exhaustion requirement of 28 U.S.C. § 2254? Surely,

third-party standing cannot be used as a method for simply avoiding all procedural rules that state criminal defendants do not like.[5]

Put simply, respondents have failed to meet the requirements of third-party standing because they have failed to demonstrate that they have a cognizable interest in this case and because *Younger* abstention cannot reasonably satisfy the "obstacle" requirement for third-party standing.

II. BECAUSE RESPONDENTS CANNOT SHOW THAT THE MICHIGAN STATUTE IS UNCONSTITUTIONAL IN ALL OF ITS APPLICATIONS, THEIR FACIAL CHALLENGE NECESSARILY FAILS.

The Sixth Circuit also erred in holding that the Michigan statute's denial of appointed counsel to aid in the drafting of a petition for leave to appeal was unconstitutional on its face.[6] As aptly demonstrated by the State of Michigan, neither the text of the Constitution nor this Court's precedents create a right to appointed counsel for that purpose.

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[5] Respondents have also asserted that the criminal defendants face a "genuine obstacle" to asserting their claims in state court because they lack counsel to aid them in asserting these claims. This argument is a red herring. Respondents are criminal defense attorneys and could have chosen to represent any number of criminal defendants in their state court proceedings to aid them in challenging this statute. Instead, respondents opted to initiate this federal court action—presumably at their own expense. Respondents desire to avoid state court appears to be the only reason to file this suit rather than to represent defendants in their ongoing state-court proceedings. There simply is no "genuine obstacle."

[6] In light of this Court's ruling, in *McKane* v. *Durston*, that criminal defendants do not have a constitutional right to an appeal, 153 U.S. 684, 687 (1894), respondents cannot assert that Michigan's decision not to grant an appeal as of right violates the Due Process Clause of the Fourteenth Amendment. Instead, respondents must argue that Michigan's decision not to appoint counsel to aid criminal defendants in filing petitions for leave to appeal violates the Equal Protection Clause and Due Process Clause.

But even if the Constitution created such a right, its existence would not doom the Michigan statute. Respondents here make a facial challenge to the constitutionality of the Michigan statute, requiring them to demonstrate "that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745 (stating that a party making a facial challenge to a statute must demonstrate that there are no circumstances under which the statute would be constitutional).

Although respondents have attempted to meet this high standard by characterizing Michigan's rule as denying defendants the right to counsel, the statute does no such thing. Instead, as shown below, Michigan has presented defendants with a choice—they may plead not guilty, in which case they will be afforded all of their procedural rights (including their right to counsel on appeal) or they may decide to forgo all of these rights by pleading guilty. Indeed, Michigan's rules of court require that a criminal defendant be fully informed of the consequences of pleading guilty—including that he will forfeit any right that he might have to appellate counsel—before the trial court may accept a guilty plea. See Mich. Comp. Laws Ann. § 770.3a(4); Mich. Ct. R. 6.302(B)(5), (6).

In light of these rules, respondents can succeed in this action only if they can demonstrate (1) that criminal defendants have a right to appointed counsel to aid in filing an application for leave to appeal and (2) that criminal defendants in Michigan have, as a class, not knowingly and intelligently waived this right by pleading guilty. But the validity of a waiver can only be determined on a case-by-case basis. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Accordingly, respondents cannot succeed in their facial challenge to Michigan's statute because they cannot demonstrate that it will in every application result in a constitutional violation.

A. The Sixth Circuit Ignored The Settled Principle That A Criminal Defendant May Waive His Right To Counsel As Long As He Does So Knowingly, Intelligently, And Voluntarily.

The Sixth Circuit's decision ignored the fact that, even if criminal defendants have a right to the aid of counsel in filing petitions for leave to appeal, that right can be waived.

1. In *Johnson* v. *Zerbst*, this case faced the question of whether criminal defendants had waived their right to counsel. 304 U.S. at 464. The Court noted that a criminal defendant was free to waive his right to counsel so long as he did so knowingly and intelligently:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .

Id.; see also *Adams*, 317 U.S. at 279 (stating that a defendant can waive his right to counsel so long as he does so "with eyes open").

Moreover, this Court has held that a criminal defendant may waive his right to counsel knowingly and intelligently even without complete knowledge. In *United States* v. *Ruiz*, this Court held that a prosecutor need not provide all potential impeachment information to a criminal defendant before he enters a guilty plea. 536 U.S. 622, 625 (2002). Although the prosecutor would have been forced to disclose this information had the case gone to trial, the failure to disclose it did not render the defendant's guilty plea unknowing. As the Court put it:

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would

> likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.

Id. at 629.

Similarly, in *Iowa* v. *Tovar*, 124 S.Ct. 1379 (2004), the Court faced the question of what warnings were required to make a waiver of counsel at the guilty plea stage knowing and intelligent. The Court rejected the notion adopted by the court below that the trial judge was required to warn defendants of the specific uses that an attorney could serve. See *id.* at 1389. The Court concluded instead that, on the facts of that case, the warnings given to the criminal defendant, including the trial court's provision of the ordinary guilty plea litany, were sufficient to inform the defendant of his right to counsel and to provide him with sufficient information to knowingly and intelligently waive his right to counsel. *Id.* at 1389-90.

In short, this Court's precedents establish that a criminal defendant will be held to have knowingly and intelligently waived his right to counsel so long as he is provided reasonable information about his right prior to waiving it.

2. At the same time, a criminal defendant may waive his rights through his actions. Indeed, this Court has previously held that the very act of pleading guilty necessarily requires a defendant to waive numerous procedural rights: "When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U.S. at 628-29 (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). And in *Boykin* v. *Alabama*, this Court noted that "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." 395 U.S. at 242. Accordingly, the Court held that, in pleading guilty a defendant necessarily

waives his right to trial by jury, his right against self incrimination, and his right to confront his accusers. *Id.*

Accordingly, it is beyond dispute that criminal defendants knowingly and intelligently waive these rights when they plead guilty so long as they are informed of these rights and informed that by pleading guilty they will waive them. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

B. Michigan Court Rules Ensure That A Guilty Plea Will Ordinarily Constitute A Knowing And Intelligent Waiver Of A Defendant's Right, If Any, To Appellate Counsel.

Michigan procedure, moreover, ensures that criminal defendants, as a condition of pleading guilty, will ordinarily be required to make a knowing and intelligent waiver of their right to appeal and to the aid of counsel in filing a petition for leave to appeal. Accordingly, the Michigan statute forbidding the State to provide counsel for such purposes does not deprive defendants of any rights in case in which such warnings are properly given.

Michigan Court Rule 6.302(B)(6) provides that a trial court must inform the defendant that "if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies." This warning is given expressly to every criminal defendant before he is allowed to enter a plea of guilty. Thus, a criminal defendant who pleads guilty will ordinarily be fully informed that by entering that plea he is waiving any right that he might have to post-conviction counsel.

Given that these defendants are fully informed of their rights and of the consequences of pleading guilty, the very act of pleading guilty constitutes a knowing and intelligent waiver of their rights to counsel. See *Brady*, 397 U.S. at 748 (holding that a defendant knowingly and intelligently waives his trial rights by pleading guilty). Moreover, in light of this

Court's recent precedents in *Tovar* and *Ruiz*, respondents cannot demonstrate on a *per se* basis that criminal defendants must be given some broader warnings about the usefulness of counsel. Thus, the Michigan rules of procedure ensure that criminal defendants will generally make a knowing and intelligent waiver of his right to counsel by pleading guilty.

C. A Rule Requiring A Waiver Of Constitutional Rights As A Condition Of Some Other Privilege Cannot Be Facially Unconstitutional Where, As Here, There Is A Reasonable Likelihood That Some Such Waivers Will Be Knowing And Intelligent.

Given these facts, the Michigan statute cannot be deemed facially invalid.

1. As with virtually all waiver issues, the question whether any particular defendant has knowingly and intelligently waived his right to counsel—if such a right exists—requires a fact-specific inquiry. As this Court has held: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Zerbst*, 304 U.S. at 464.

This fact-specific inquiry makes a facial challenge to the constitutionality of the Michigan statute inappropriate. It makes it impossible for respondents to carry their burden of establishing "that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

2. Finally, there are strong policy reasons for rejecting facial challenges to rules such as the Michigan statute at issue here. States have a strong interest in obtaining guilty pleas and in ensuring the finality of the resulting convictions. As this Court recognized in *Brady*, "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." 397 U.S. at 750. The Court went on to

explain that guilty pleas offer very real advantages for the state:

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. at 752. The Court concluded that it could not hold that a system in which the government offers the defendant an incentive to plead guilty somehow renders the waiver of his right to trial involuntary. *Id.* at 753. Ultimately, then, *Brady* stands for the principle that states may encourage defendants to plead guilty and may attempt to finalize their convictions so long as they do not attempt to coerce a defendant to waive his constitutional rights.[7]

In this case, Michigan has effectuated its interest in the finality of guilty pleas by mandating both that a defendant may not appeal as of right after he enters a guilty plea and that a defendant who pleads guilty will not receive appointed counsel to aid in filing a petition for leave to appeal. See

---

[7] This Court has also similarly recognized the States' interest in the finality of guilty verdicts in the analogous context of collateral attacks:

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

Timmreck, 441 U.S. at 784 (quoting *United States* v. *Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting)); *see also Zerbst*, 304 U.S. at 468-69 (applying a presumption of regularity to final judgments).

Mich. Const. of 1963, art. I, § 20 ("an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court."); Mich. Comp. Laws Ann. § 770.3a(1) (stating that a criminal defendant who pleads guilty will not receive appointed counsel). There can be no doubt that Michigan was free to remove the right to appeal from a guilty verdict. See *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

In light of Michigan's strong interest in ensuring the finality of guilty pleas, there can likewise be no objection to the State's decision to condition the acceptance of a guilty plea on the defendant's agreement to waive his right to counsel. Because Michigan continues to give defendants the choice of whether to waive their right to counsel—by allowing defendants to plead not guilty—it has not violated these defendants' rights by the mere enactment of the rule at issue here.

* * * *

In sum, the Sixth Circuit's decision to allow respondents to challenge Michigan's rule in federal court represents an improper end-run around *Younger* v. *Harris*, and should be reversed. Likewise, the Sixth Circuit's decision that the Michigan rule is unconstitutional is not only wrong as a matter of equal-protection doctrine, but also ignores the fact that the rule amounts to nothing more than a requirement that criminal defendants waive any right they may to appellate counsel when they make the choice to plead guilty. Because the validity of such a waiver can only be determined on a case-by-case basis, the Sixth Circuit's decision to allow respondents to proceed with a facial challenge should also be reversed.

CONCLUSION

The decision by the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

JUDGE JOHN F. KOWALSKI, JUDGE WILLIAM A. CRANE, AND JUDGE LYNDA L. HEATHSCOTT,
Petitioners,

JUDGE DENNIS C. KOLENDA,
Respondent,

v.

JOHN CLIFFORD TESMER, CHARLES CARTER, ALOIS SCHNELL, ARTHUR M. FITZGERALD, AND MICHAEL D. VOGLER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. INDIGENT DEFENDANTS LACK THE EDUCATION AND LITERACY SKILLS TO MEANINGFULLY REPRESENT THEMSELVES ON FIRST APPEAL	4
A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills	5
B. Portrait of an Appeal Following a Guilty Plea: Complicated Sentencing Errors and Procedural Pitfalls	8
C. The "Protections" Provided Under Michigan's Scheme Are No Substitute for Counsel	15
II. THE COMPLEXITY OF APPEAL AND INDIGENT DEFENDANTS' CHARACTERISTICS REQUIRE THIRD-PARTY STANDING TO PROTECT INDIGENTS' CONSTITUTIONAL RIGHT TO COUNSEL	17
A. The Procedural Hazards of Federal Habeas Corpus	18
B. Meeting Substantive Habeas Corpus Criteria	21

TABLE OF CONTENTS—Continued

	Page
III. MICHIGAN'S DEPRIVATION OF COUNSEL TO INDIGENT APPELLANTS VIOLATES CONSTITUTIONAL PRINCIPLES INDEPENDENT FROM THOSE UNDERLYING *DOUGLAS*	22
A. Michigan's First Appeal Is a "Critical Stage" Requiring Counsel Under *Gideon*	23
B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel In Their First Appeal On the Merits	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Abela v. Gen. Motors Corp., 677 N.W.2d 325 (Mich. 2004)	22
Anders v. California, 386 U.S. 738 (1967)	28
Argersinger v. Hamlin, 407 U.S. 25 (1972)	5
Baldwin v. Reese, 124 S. Ct. 1347 (2004)	19
Bell v. Cone, 535 U.S. 685 (2002)	23
Brecht v. Abrahamson, 507 U.S. 619 (1993)	26
Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987)	30
Coleman v. Thompson, 501 U.S. 722 (1991)	19-20
Cooper v. Oklahoma, 517 U.S. 348 (1996)	29-30
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Gardner v. Florida, 430 U.S. 349 (1977)	24
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TABLE OF AUTHORITIES—Continued

	Page
Iowa v. Tovar, 124 S. Ct. 1379 (2004)	23
Johnson v. Zerbst, 304 U.S. 458 (1938)	5
Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000)	27
Mata v. Egeler, 383 F. Supp. 1091 (E.D. Mich. 1974)	30
Medina v. California, 505 U.S. 437 (1992)	29
Mempa v. Rhay, 389 U.S. 128 (1967)	4, 23-26
Miller v. Albright, 523 U.S. 420 (1998)	17, 22
O'Sullivan v. Boerckel, 526 U.S. 838 (1999)	13
Pennsylvania v. Finley, 481 U.S. 551 (1987)	20
Penson v. Ohio, 488 U.S. 75 (1988)	16, 24, 27-28
People v. Babcock, 666 N.W.2d 231 (Mich. 2003)	12
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People v. Stauffer, 640 N.W.2d 869 (Mich. 2003)	12

TABLE OF AUTHORITIES—Continued

	Page
Powell v. Alabama, 287 U.S. 45 (1932)	5
Roe v. Flores-Ortega, 528 U.S. 470 (2000)	24
Rose v. Lundy, 455 U.S. 509 (1982)	20
Ross v. Moffitt, 417 U.S. 600 (1974)	22, 26-27
Singleton v. Wulff, 428 U.S. 106 (1976)	17
Smith v. Robbins, 528 U.S. 259 (2000)	28-29
Swenson v. Bosler, 386 U.S. 258 (1967)	15-16
Tollett v. Henderson, 411 U.S. 258 (1973)	11
United States v. Ash, 413 U.S. 300 (1973)	4, 24, 26, 28
United States v. Gonczy, 357 F.3d 50 (1st Cir. 2004)	10
United States v. Wade, 388 U.S. 218 (1967)	24, 28
Williams v. Taylor, 529 U.S. 362 (2000)	21
Yarborough v. Alvarado, No. 02-1684, 2004 WL 1190042 (U.S. June 1, 2004)	21
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TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

	Page
28 U.S.C. § 2254 (2004)	18-19, 21
Mich. Comp. L. (MCL) § 600.321(1)(a) (2003)	14
MCL § 769.34 (2004)	11
MCL § 770.3a (2000)	*passim*
MCL §§ 777.31-777.69 (2004)	11
Mich. Ct. R. (MCR) 2.002	14
MCR 2.113(B)	14
MCR 6.302	10
MCR 6.425	10-11, 14
MCR 6.502	18
MCR 6.508	18
MCR 6.509	19
MCR 7.205	10-14, 19
MCR 7.212(C)	13-14

STUDIES, ARTICLES, AND OTHER MATERIALS

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide—joined by 82 state and local affiliate organizations with another 28,000 members—including private criminal defense lawyers, public defenders, and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly issues affecting indigent defendants.

In this case, NACDL and NAFD are concerned about Michigan Compiled Laws § 770.3a's denial of appellate counsel to indigent defendants who enter guilty pleas, leaving

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL, NAFD, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioners and Respondents have consented to the filing of this brief, and pursuant to Rule 37.3(a), NACDL and NAFD have filed the letters of consent with the Clerk of the Court.

these defendants—most of whom are functionally illiterate—to identify and brief complicated sentencing and other errors in their first and only appeal on the merits.

SUMMARY OF ARGUMENT

I. It is remarkable that forty years after this Court's landmark decisions in *Gideon v. Wainwright* and *Douglas v. California*, a State would seek to deprive counsel to the poor at a critical stage in the criminal justice process. Petitioners defend Michigan Compiled Laws (MCL) § 770.3a (2000) largely on the grounds that appeals following guilty pleas are "simpler" matters and therefore indigent defendants can adequately protect their own rights on first appeal. Pet'rs Br. at 32 (citation omitted). That position ignores both the abilities of indigent appellants and the real world complexity of guilty plea appeals.

Indigent defendants who plead guilty are the poorest, least educated, least literate members of our society. National literacy studies show that these defendants, most of whom will be incarcerated, lack the skills necessary to write a note disputing an improper charge on a credit card bill, much less meet the substantive and procedural requirements of filing and prosecuting an appeal. Moreover, while involving fewer issues than appeals after trial, appeals following guilty pleas are equally complex. Guilty plea appeals typically involve errors under the notoriously difficult Michigan Sentencing Guidelines and are subject to unforgiving procedural requirements under the Michigan Court Rules (MCR). Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are "frivolous," *see* Judge Kolenda Br. at 16—the success rate of these appeals is relatively high. Indeed, as reflected below, an examination of a typical indigent appeal in Michigan confirms, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). All the more so to the poor, functionally illiterate defendants targeted by MCL § 770.3a.

II. The same barriers that render an indigent defendant's *pro se* direct appeal meaningless likewise necessitate the protection of their right to counsel through third-party standing. While Respondents clearly demonstrate that third-party standing does not demand a showing that it is *impossible* for indigent defendants in Michigan to assert their own rights, even an "impossibility" standard is met in the unique circumstances here. This case is unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel.

Further, the situation is atypical because—given the Michigan Supreme Court's deci-sion upholding the practice of depriving appellate counsel to indigent defendants who plead guilty—poor defendants must turn to federal habeas corpus review as the principal means to protect their constitutional rights. Only 1% of federal habeas corpus petitions are granted on the merits. And those peti-tioners had the right to counsel on first appeal to help identify and brief the issues subject to habeas relief. While there might somewhere be one of those rare individuals—like Clarence Earl Gideon—who defies the odds and overcomes the seemingly impossible obstacles to presenting a claim *pro se*, the hard reality of the system is that the poor, under-educated, illiterate defendants denied counsel under MCL § 770.3a have little to no hope of protecting their own rights.

III. Finally, as Respondents aptly have illustrated, Michigan's system falls squarely under *Douglas*, and the deprivation of counsel to indigent defendants pursuant to MCL § 770.3a violates both due process and equal protection. But this case transcends the constitutional principles underlying *Douglas*. Michigan's appeal for indigents who plead guilty constitutes a "critical stage" of criminal proceedings covered by the Sixth Amendment's right to counsel under *Gideon*. To

be sure, this Court has never had need to address whether an initial guilty-plea appeal like Michigan's constitutes a "critical stage." But in post-trial proceedings where identical interests are at stake, such as sentencing, this Court has held that counsel is required under the Sixth Amendment. *Mempa v. Rhay*, 389 U.S. 128, 135-36 (1967). And this Court has noted that *Gideon*'s right to counsel in critical stages should apply "when new contexts appear presenting the same dangers that gave birth initially to the right [to counsel] itself." *United States v. Ash*, 413 U.S. 300, 311 (1973). Michigan's initial appeal for those who plead guilty is exactly that. Accordingly, even if Petitioners were correct that Michigan's unprecedented new appellate system for indigents who plead guilty falls through the cracks of *Douglas* (which it does not), the Michigan system runs afoul of the Sixth Amendment.

In sum, Michigan's system under MCL § 770.3a is so fundamentally flawed—so contrary to the principles underlying the right to counsel—that unconstitutionality permeates the entire scheme. This Court should affirm the Sixth Circuit's decision striking down the system as unconstitutional.

ARGUMENT

I. INDIGENT DEFENDANTS LACK THE EDUCATION AND LITERACY SKILLS TO MEANINGFULLY REPRESENT THEMSELVES ON FIRST APPEAL

Petitioners' defense of MCL § 770.3a's deprivation of appellate counsel to indigent defendants rests largely on one central premise: guilty plea appeals are "simpler" and thus "defendants who plead guilty have an adequate opportunity to present their claims fairly and receive a meaningful appeal."

Pet'rs Br. at 32, 35; *accord id.* at 30-37.[2] Petitioners ignore the capabilities of indigent appellants, downplay the complexity of appeals following guilty pleas, and minimize the vital interests at stake.

A. Profile of an Indigent Appellant: An Incarcerated High School Dropout Lacking Even Basic Literacy Skills

This Court long has recognized the inability of laymen to represent themselves effectively at critical stages in the criminal justice process, including a defendant's first appeal as of right. *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (quoting same); *accord Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself"); *Argersinger v. Hamlin*, 407 U.S. 25, 32 n.3 (1972) ("That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious.") (citation omitted); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."). Michigan's MCL § 770.3a, however, does not target the

[2] MCL § 770.3a applies to defendants who plead guilty, guilty but mentally ill, or *nolo contendere*, *id.* § 770.3a(1), and effectively codifies the former practice of some Michigan state court judges who denied appointed counsel to indigents who sought to appeal plea-based convictions. For convenience, this brief will refer only to "guilty pleas," though our discussion will apply to all three types of convictions covered by MCL § 770.3a. Further, while focusing principally on MCL § 770.3a, our discussion applies to both the statute and the practice of denying appointed counsel to indigents attempting to appeal plea-based convictions.

average layman. It denies counsel to indigent defendants who plead guilty. As a group, these individuals are the poorest, least educated, and least literate members of our society.

According to Justice Department statistics, about 80% of state felony defendants use court-appointed lawyers. Caroline Wolf Harlow, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1, 5 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (analyzing data on felony defendants in state courts in 75 largest counties). The typical indigent defendant—like the indigent Respondents in this case—pleads guilty and is incarcerated. *See id.* at 6, tbls. 10-11 (71% of indigent defendants plead guilty and 71.3% of convicted indigent defendants are incarcerated); *see also Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* 61 (Brian J. Ostrom et al. eds., 2003), *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_criminal.pdf (in Michigan during 2001, only 4.5% of criminal cases were tried, 62.7% cases were disposed of by guilty pleas, 32.8% otherwise disposed of).

The incarcerated indigent, like the rest of the inmate population, is more likely to be young, male, and a member of a minority group. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Additional Corrections Facts at a Glance*, *at* http://www.ojp.usdoj.gov/bjs/gcorpop.htm (last modified May 28, 2004); *accord* Mich. Dep't of Corrections, *2002 Annual Report* 21, *available at* http://www.state.mi.us/mdoc/jobs/pdfs/2002annualReport2.pdf (last visited June 1, 2004) (average age of Michigan state male prisoner in 2002 was 35 years old; 57.7% of prison population were members of minority groups). Odds are, like 68% of the prison population, he is a high school dropout or received no high school education at all. *See* Caroline Wolf Harlow, U.S.

Dep't of Justice, *Education and Correctional Populations* 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf.[3] He likely functions at two to three grade levels below the level actually completed in school. *See* Donna Bellorado et al., U.S. Dep't of Justice, *Making Literacy Programs Work: A Practical Guide for Correctional Educators* 2 (1986).

What is more, there is an extraordinarily high probability that he is functionally illiterate. *See generally* U.S. Dep't of Educ., *Literacy Behind Prison Walls* (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf [hereinafter Literacy Report].[4] This means that while the indigent defendant may

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[3] This report analyzed data showing that 68% of inmates in state prisons have not completed high school, compared to 18% of the general population. *Education and Correctional Populations*, *supra*, at 1. The report also found that 14.2% of state inmates had an eighth-grade education or less. *Id.* at 2, tbl. 1; *cf.* Mich. Dep't of Corrections, *2001 Statistical Report* F-9-F-11, (reflecting that most participants in Michigan correctional educational services are enrolled in programs that teach Adult Basic Education (0 to 8th grade)), *available at* www.michigan.gov/documents/2001Stat_79881_7.pdf (last visited June 1, 2004).

[4] The Literacy Report, by the National Center for Education Statistics, determined that 7 out of 10 inmates are functionally illiterate. *See* Literacy Report, *supra*, at xviii, 10, 17. Specifically, relving on data from the National Literacy Survey, the report evaluated the abilities of the nation's inmate population in three areas of literacy: prose, document, and quantitative literacy. *Id.* at 15-16. Participants were rated on a scale of 1 to 5 on their capabilities within each of these three categories. *Id.* at 9 & fig. 1. The study showed that approximately 70% of inmates fell into the two lowest levels (Levels 1 and 2) for each literacy category. *Id.* at 17. Approximately one-third of inmates, for instance, scored at only Level 1 in all categories. *Id.* at 20. Many of these inmates lack basic skills such as the ability to locate the time of a meeting on a form. *Id.* at 10, 17. All lack the ability to perform only moderately more difficult tasks, such as locating an intersection on a street map. *Id.* The Literacy Report found that the average proficiency level for all inmates was Level 2, the second-to-bottom level for each literacy category. *Id.* at 19, tbl. 2.3. Thus, the "average" inmate, the report explains, lacks the ability to

have some minimal reading and writing abilities, he cannot perform a wide range of routine tasks. According to the leading federally-funded literacy study, for instance, he likely lacks the ability to:

- enter information on an application for a social security card; *id.* at 10, 17,
- use a bus schedule; *id.* at 10, 17,
- write a letter explaining an error on a credit card bill; *id.* at 10, 17,
- determine the difference in price between two tickets; *id.* at 10, 17, and
- identify information in a bar graph.

Id. at 10, 17; *see also* Michigan Literacy, Inc., *Fact Sheet: Correctional Education, at* http://www.michiganliteracy.org/corred.htm (last visited June 1, 2004).

In many ways, the typical indigent appellant is the picture of Respondent Charles Carter: a poor, black, special education student whose schooling ended at the tenth grade. *See* J.A. 28a. It is these individuals whom Petitioners claim can meaningfully represent themselves on their first and only appeal on the merits following their pleas. That position, particularly when considered in light of Michigan's complex sentencing laws and appellate procedures, defies reality.

B. Portrait of an Appeal Following a Guilty Plea: Complicated Sentencing Errors and Procedural Pitfalls

Although more limited in scope, appeals following guilty pleas are no less complex than other appeals. In the era of determinate sentencing guidelines, sentencing issues are increasingly common on appeal. *See* National Center for

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perform such tasks as writing a brief letter to explain an error on a bill or using a bus schedule. *Id.* at 10, 17. Conversely, fewer than 1% of inmates performed at the top of the literacy scale. *Id.* at 19-20.

State Courts, *Understanding Reversible Error in Criminal Appeals* 18-19 (1989) (study of appeals in five state appellate courts finding high rate of sentencing issues on appeal); Mara Matuszak, Note, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. Det. Mercy L. Rev. 431, 438-39 (1996) (discussing report that found that the majority of appeals following a guilty plea in Michigan involve sentencing issues).[5] Sentencing guidelines, like Michigan's, "are often so bewilderingly complex as to virtually guarantee appellate issues in a high percentage of sentencing decisions." *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 184 (1995).

Reflecting the complexity of the issues—and contrary to the myth that most appeals following guilty pleas are "frivolous," *see* Judge Kolenda Br. at 16—the success rate of these appeals is relatively high. *See* Matuszak, *supra*, at 440-41, 443.[6] By some accounts, anywhere from 12% to 47% of Michigan appeals following guilty pleas result in some form of relief. *Id.* at 443 (discussing studies by the Michigan State Appellate Defender's Office and the Michigan Appellate Assigned Counsel System (MAACS)). MAACS estimated that errors in criminal appeals in 1990 resulted in cumulative sentence reductions of 1,220.4 years. *Id.* at 441.

Thus, an effective system for first appeals provides a vital check on criminal justice proceedings, particularly the integrity of the plea and sentencing process. Michigan's scheme leaves this safeguard largely in the hands of unrepresented indigents on the premise that they can fend for

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[5] *Cf.* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. U. L. Rev. 1441, 1491 (1997) (65% of federal criminal appeals in 1994-95 involved sentencing issues).

[6] *See also* Calhoun, *supra*, at 190-91 (discussing success rates of criminal appeals and 1992-93 study of two appellate courts which found that 24% of appeals after plea received some form of relief).

themselves. A brief review of what that means, however, shatters this notion.

1. *Finding and Arguing a Point of Error*

In Michigan, the indigent defendant who pleads guilty has only twenty-one days to file a timely "Application for Leave to Appeal," which identifies and argues all points of error. MCR 7.205(A). Issues not raised by the indigent defendant are waived. MCR 7.205(D)(4). On his own, therefore, the indigent defendant quickly will have to analyze an array of potential errors, including: What issues were lost as the result of the plea?[7] Did the government explicitly or implicitly violate the plea agreement?[8] Did the judge meet all statutory and procedural requirements to ensure the plea was voluntary?[9] Were there any scoring or other errors under the Michigan Sentencing Guidelines?[10] Did the State fulfill its obligations in providing a transcript or other materials required by law?[11] And did counsel provide effective

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[7] *See, e.g., Guilty Pleas*, 91 Geo. L.J. 362, 372-79 (2003) (reviewing rights retained and lost as result of guilty plea); *see also People v. Bulger*, 614 N.W.2d 103, 133-34 (Mich. 2000) (Cavanagh, J., dissenting) (discussing errors that survive guilty plea in Michigan).

[8] *See, e.g., People v. Nixten*, 454 N.W.2d 160 (Mich. Ct. App. 1990) (finding error where government explicitly failed to fulfill agreed sentence recommendation); *United States v. Gonczy*, 357 F.3d 50, 53-54 (1st Cir. 2004) (finding error where government implicitly failed to fulfill agreed sentence recommendation by making statements undercutting recommended sentence).

[9] *See* MCR 6.302(B) (providing information court must give defendant who pleads guilty); MCR 6.425(B)-(E) (providing information court must give defendant at sentencing).

[10] *See, e.g., People v. Knolton*, No. 237796, 2003 WL 1343001, at *4 n.28 (Mich. Ct. App. Mar. 11, 2003) (remanding for resentencing for guidelines error).

[11] *See People v. Plaza*, 617 N.W.2d 687, 688 (Mich. 2000) (Kelly, J., dissenting) (noting that court should have remanded because indigent was denied transcript); *see id.* at 687 (Corrigan, J., concurring) (noting that remand unnecessary because indigent failed to raise transcript issue in *pro se* application for appeal).

assistance in the plea process, such as objecting to sentencing errors?[12] This task must be accomplished in less than a month by an individual who typically cannot "[l]ocate two features of information in [a] sports article." *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in prose literacy Level 2). Simply determining whether a sentencing error exists would give most lawyers pause. To identify such an error, an indigent defendant would have to wander alone [13] through Michigan's comprehensive statutory scheme, which includes nearly fifty provisions identifying Offense Variables, MCL §§ 777.31 to 777.49a (2004), Prior Record Variables, MCL §§ 777.50 to 777.57 (2004), and multiple sentencing grids. MCL §§ 777.61-777.69 (2004). He also would have to make sure to use the guidelines in effect at the time of his offense. *See* MCL § 769.34(2) (2004). This task will not be easy given the frequent changes

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[12] *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973) (plea does not foreclose ineffective assistance of counsel claims).

[13] While MCL § 770.3a provides an indigent defendant with appellate counsel when a sentence exceeds the guideline range, it does not require counsel for other errors, such as an "error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL § 769.34(10); *see also* MCL § 770.3a(2)(b) (requiring counsel where sentence exceeds guidelines range); *id.* § 770.3a(3) (permitting but not requiring appointment of counsel for some sentencing errors). If the sentence exceeds the guidelines range, the court must advise the defendant that he is entitled to court appointed counsel. MCR 6.425(E)(2)(b)(i). The court also must state the reasons for the departure on the record, MCL § 769.34(3), and advise the defendant orally and in writing that he may appeal the sentence on the basis of the departure. *See* MCR 6.425(E)(4). That process assumes, however, that the court itself is aware that the sentence exceeded the guidelines, which is not always the case given the complexity of the system. *See People v. Knolton*, 2003 WL 1343001, at *4 n.28 (remanding for resentencing when trial court failed to realize that sentence was outside guidelines range and thus failed to follow procedures for guidelines departures).

to Michigan's sentencing laws. *See* Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich. Bar J. Online 6 (2000) (noting legislative amendments to guidelines in ten different 1999 public acts with five different effective dates), *available at* http://www.michbar.org/journal/article.cfm?articleID=92&volumeID=8&viewType=archive; *see also People v. Babcock*, 666 N.W.2d 231, 253-56 (Mich. 2003) (providing background of Michigan's replacement of judicial sentencing guidelines with statutory guidelines).

To help tackle the difficult statutory scheme, the indigent defendant may turn to the State Court Administrative Office's "Guidelines Manual." *See* Mich. Sentencing Guidelines Manual (2003). That the "user friendly" guide is over one hundred pages long, contains some eighteen different grids, three pages of definitions, and eight pages of instructions, *see id.*, reflects the daunting task facing a lawyer reviewing the propriety of a sentence, let alone someone who typically cannot understand a bar graph or solve basic math problems. *See* Literacy Report, *supra*, at 10 (identifying abilities of individuals in document literacy Levels 2 and 3 and quantitative literacy Level 3).

After making his way through the Manual, the indigent defendant would have to research judicial interpretations of the guidelines. Only last year, the Michigan Supreme Court had to clarify "unfamiliar or confusing" guideline requirements, *People v. Stauffer*, 640 N.W.2d 869, 871 (Mich. 2003), and even included a twelve paragraph appendix to one of its decisions to aid practitioners on Michigan's intricate sentencing procedures. *Babcock*, 666 N.W.2d at 244-45.

Assuming, however, that the indigent defendant could in fact identify an error in sentencing—to say nothing of the

other potential errors hidden from the untrained eye[14]—he would then face his next hurdle: articulating the error in writing and meeting all Michigan appellate procedural requirements.

2. *Complying With Michigan's Appellate Rules*

The right to counsel on the first merits appeal is important not only to identify and present the substantive legal grounds, but also for "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case." *Evitts*, 469 U.S. at 394 n.6. Like most states, Michigan's appellate procedures are complex. The procedures for appeals following guilty pleas are no exception. Under MCR 7.205, the indigent defendant's so-called "Application" for appeal must be filed within twenty-one days from entry of the judgment, MCR 7.205(A), though the court may accept an untimely filing up to one year after judgment. *See* MCR 7.205(F)(1)-(4). Any issue not raised in the Application is forever waived, both in state court actions, MCR 7.205(D)(4), and in subsequent federal habeas corpus proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

To meet the filing requirements, the indigent defendant must submit five copies of his Application, "stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; [and] setting forth a concise argument, conforming to MCR 7.212(C) . . . ." MCR 7.205(B)(1). MCR 7.212(C), in turn, sets forth the required contents of appellate briefs. Specifically, the indigent's appeal from a plea-based

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[14] *See Bulger*, 614 N.W.2d at 134-35 (Cavanagh, J., dissenting) (providing samples of actual Michigan guilty plea appeals reflecting complex issues in addition to sentencing).

conviction must, using the specific format required under the rule, include a statement of jurisdiction, the standard of review, record citations, the relevant statutes or constitutional provisions, a statement of the issues, and a legal argument. MCR 7.212(C)(4)-(7). All of this must be submitted in English. MCR 2.113(B).

The indigent defendant also must obtain and file multiple copies of several documents, including the judgment, docket entries, and certain transcripts, *see* MCR 7.205(B), and must either tender a $375 filing fee or submit a motion to waive fees and an affidavit of indigency. *See* MCL § 600.321(1)(a) (2003); MCR 2.002.

Unlike defendants with financial resources, most indigent defendants who plead guilty will not have a lawyer-like Application and supporting brief. Nor will they have counsel's insights regarding the issues that should be raised and the risks of not raising a particular issue. Instead, Michigan law provides defendants who plead guilty a three-page form Application created by the State Court Administrative Office. MCR 6.425(E)(2)(d); *see* Pet. App. 160a-170a (sample application form).[15]

Perhaps recognizing that few unrepresented indigents will meet the twenty-one day filing deadline, the form begins with a "Statement of Delay" section for the defendant to explain why the filing is untimely. *See* Pet. App. 160a. The form also requires entry of information such as "Charge Codes, MCL citation/PACC Code," Pet. App. 166a, and includes a detailed instruction sheet concerning all of the documents needed to accompany the filing. Pet. App. 160a-164a. Although following these directions might not pose a major challenge for a college graduate, the average indigent inmate has very low "document literacy" skills, and typically cannot

[15] The current version of the form is available at http://courts.michigan.gov/scao/courtforms/appeals/cc405.pdf (last visited June 1, 2004).

complete an application for a social security card or enter information on an automobile maintenance record form. Literacy Report, *supra*, at 10, 17.

Aside from these procedural formalities, the form requires the indigent defendant to set forth each of the following: the questions presented for appeal, the statement of the facts, the arguments, and the relief requested. Pet. App. 169a-170a. With regard to the legal argument section, the indigent defendant is advised to "state the law that supports your position and explain how the law applies to the facts of your case." Pet. App. 170a. That is the extent of guidance the indigent defendant is provided on making his case for appeal.

C. The "Protections" Provided Under Michigan's Scheme Are No Substitute for Counsel

Petitioners claim that a poor defendant will be able to overcome the obstacles above because he "will have substantial materials available that are sufficient to permit him to present his claims fairly and thus receive a meaningful appeal." Pet'rs Br. at 35; *see also* Judge Kolenda Br. at 23-24. Those materials, however, are scarcely better than no guidance at all.

Petitioners first stress that indigent defendants receive free transcripts and possess postconviction motions and other materials prepared by trial counsel. Pet'rs Br. at 35-36. This Court previously has recognized that such materials are no substitute for having a lawyer cull the record, identify errors, and craft an appellate brief. *See Swenson v. Bosler*, 386 U.S. 258 (1967) (per curiam). In *Swenson*, Missouri argued that no counsel was necessary to indigents on first appeal of right because trial counsel had filed a "motion for new trial which specifically designated the issues which could be considered on direct appeal" and the State provided the indigent defendant a free transcript. *Id.* at 259. This Court rejected the argument, concluding that "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate

court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript" are benefits that cannot be denied to a defendant simply because he is poor. *Id.*; *see also Evitts*, 469 U.S. at 394 (citing *Swenson* for importance of preparation of brief by attorney in first appeal of right). In any case, the reality is that counsel in most cases will not produce written post-conviction motions, and in any event, such motions likely will not adequately address appellate issues. *See People v. Bulger*, 614 N.W.2d 103, 139-40 (Mich. 2000) (Cavanagh, J., dissenting) (discussing why motions are inadequate substitutes for an appellate brief).

Petitioners next highlight that indigent defendants have access to jailhouse briefs of other inmates. Pet'rs Br. at 36. Again, this Court previously has rejected similar arguments promoting second-hand justice for indigents. In *Penson v. Ohio*, 488 U.S. 75 (1988), for example, the Court rejected Ohio's argument that a defendant who received no appellate counsel was adequately protected by briefs filed by co-defendants: "One party's right to representation on appeal is not satisfied by simply relying on representation provided to another party . . . . A criminal appellant is entitled to a single-minded advocacy for which the mere possibility of a coincidence of interest with a represented codefendant is an inadequate proxy." *Id.* at 86-87.

Finally, Petitioners resort to the "nontechnical and easily understood" three-page form Application for appeal discussed above. Pet'rs Br. at 37. While short and very much unlike a lawyerly submission, the form still requires the indigent to argue the law and cope with an intricate procedural system—a task the average layperson, much less a functionally illiterate person, is ill-equipped to do.

II. THE COMPLEXITY OF APPEAL AND INDIGENT DEFENDANTS' CHARACTERISTICS REQUIRE THIRD-PARTY STANDING TO PROTECT INDIGENTS' CONSTITUTIONAL RIGHT TO COUNSEL

The same barriers that render an indigent defendant's *pro se* direct appeal meaningless likewise necessitate the protection of the right to counsel through third-party standing. As Respondents clearly demonstrate, third-party standing does not demand a showing that it is *impossible* for indigent defendants in Michigan to assert their own rights. Rather, this Court has required only the existence of a "genuine obstacle" to the third-party's assertion of his own rights. *Singleton v. Wulff*, 428 U.S. 106, 116 (1976) (plurality opinion). The "obstacle" need not be "insurmountable," but must present an impediment to the assertion of the constitutional rights at issue. *See id.* at 117; *accord Miller v. Albright*, 523 U.S. 420, 450 (1998) (O'Connor, J., concurring) ("[W]here a hindrance impedes the assertion of a claim, the right likely will not be asserted—and thus the relevant law will not be enforced—unless the Court recognizes third-party standing.").

In the unique circumstances of this case, however, the obstacles to an indigent defendant's ability to protect his own rights truly are insurmountable. This case is unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel. Moreover, the situation is atypical because an indigent defendant's primary recourse lies in federal habeas corpus review. Specifically, as the Sixth Circuit recognized below, the Michigan Supreme Court's decision in *Bulger* forecloses any relief on the constitutional challenge raised here in state court proceedings. *See* Pet. App. 14a (concluding that in light of *Bulger*, "the defendant would lose in this [direct appeal] proceeding, for Michigan will be bound by its precedent."). Thus, the vindication of a Michigan indigent defendant's

constitutional right lies primarily in collateral federal habeas corpus proceedings, which make the tangled process of direct review seem simple.

A. The Procedural Hazards of Federal Habeas Corpus

A 1995 study funded by the Justice Department found that 63% of federal habeas corpus petitions are dismissed without reaching the merits. *See* Roger A. Hanson & Henry W. K. Daley, U.S. Dep't of Justice, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf [hereinafter *Federal Habeas Corpus Review*]. Of that number, 3 out of 4 were dismissed on procedural grounds. *Id.* A brief overview of some of the procedural hazards of modern habeas corpus practice illustrates why this is the case.

To properly bring a federal habeas corpus petition, the indigent defendant first must exhaust available state remedies. *See* 28 U.S.C. § 2254(b)(1)(A) (2004). The exhaustion doctrine has been described as "a trap for the uneducated and indigent pro se prisoner-applicant," and "one of the most difficult procedural obstacles" to overcome.[16] Under Michigan's system, exhaustion requires the indigent defendant to file a post-conviction motion with the trial court under MCR 6.502. This motion must establish that the issue was raised in the direct appellate proceedings. *See* MCR 6.508(D)(3). Thus, for the indigent defendant who fails to raise the issue in his *pro se* Application for appeal, the potential for successful federal habeas corpus review likely ends here.

[16] Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451, 489-90 (1991) (citations omitted).

The post-conviction motion also must identify all grounds for relief with specificity. Although Michigan provides a form motion for post-conviction proceedings,[17] the form fails to indicate the requisite level of specificity necessary to present a federal claim properly to the state court, and thereby preserve it for federal habeas corpus review. The four-page form simply tells the defendant to identify "the legal grounds for the relief you want."[18] As this Court recently held, however, a federal habeas corpus petitioner's state court post-conviction motion must clearly identify the federal nature of his claim. *Baldwin v. Reese*, 124 S. Ct. 1347, 1351 (2004). It is not enough that a substantively identical state law claim was made. *Id.* Rather, the indigent defendant must clearly label the claim "federal" in order to satisfy the exhaustion requirement. *Id.*

Even if properly presented, under *Bulger* the state trial court will deny an indigent defendant's post-conviction motion asserting his right to appellate counsel. The indigent defendant then must file an application for leave to appeal this denial to both the Michigan Court of Appeal and the Michigan Supreme Court, each time raising with specificity the "federal" nature of his claim. *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990); *see also* MCR 6.509; MCR 7.205.

Failure to assert his constitutional claim at any *one* of these steps can result in dismissal by the federal district court. *See* 28 U.S.C. § 2254(b)(1)(A) (codifying traditional exhaustion requirement); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."). Indeed, if the indigent defendant raises multiple

[17] This form is available at http://courts.michigan.gov/scao/courtforms/felonycriminal/cc257a.pdf (last visited June 1, 2004).

[18] *Id.*

issues, some of which were not properly presented in the state courts, the entire petition must be dismissed. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (discussing mixed-petition doctrine). Additionally, a separate doctrine—the procedural default doctrine—bars federal habeas consideration of a claim where the state court declines to address the defendant's federal constitutional claim based on the indigent's failure to comply with state procedural requirements. *See Coleman*, 501 U.S. at 729.

Few petitioners successfully complete the state post-conviction process. Over half (57%) of federal habeas petitions are dismissed for failure to exhaust state remedies, and another 12% for procedural default. *Federal Habeas Corpus Review*, *supra*, at 17. Other petitioners are released from prison before finishing state post-conviction review, which on average takes several years to complete. *See id.* at 12 ("Individuals with relatively short sentences are often out of prison before they can arrive at the Federal habeas doorstep."). And these unsuccessful federal habeas corpus seekers differ in one critical respect from the Michigan defendants denied counsel under MCL § 770.3a: these petitioners had appellate counsel identify federal issues and craft an appellate brief on the first direct appeal that could then be used to assist in raising issues in collateral proceedings. *Cf. Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) ("In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review. We think that the same conclusion necessarily obtains with respect to postconviction review."). Even if the indigent defendant makes it to the federal courthouse door, however, that alone does not guarantee that his right to counsel claim will be protected.

B. Meeting Substantive Habeas Corpus Criteria

Even assuming the indigent defendant's petition is one of the few considered on the merits, the district court likely will deny the petition. Only 1% of federal habeas corpus petitions are granted on the merits and 1% remanded to state courts. *Federal Habeas Corpus Review*, *supra*, at 17. That is likely the case in part because a federal court evaluating an application for habeas corpus relief does not simply review whether the state court issued a correct decision. Rather, a federal court grants a writ of habeas corpus only where the state court's resolution of a constitutional question was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A federal court may grant a writ of habeas corpus as "contrary to" clearly established federal law only where the state court decision was "opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Alternatively, the federal court can analyze the indigent defendant's claim under the "unreasonable application" standard, which asks "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *accord Yarborough v. Alvarado*, No. 02-1684, 2004 WL 1190042, at *10 (U.S. June 1, 2004). This standard, combined with the procedural requirements, confirms the Sixth Circuit's conclusion that obtaining habeas corpus relief under the circumstances of this case is "virtually impossible." Pet. App. 15a.

Should a single defendant prevail in a federal district court, Michigan state courts likely would not apply that individual's favorable determination to any other defendant, due to the conflict with *Bulger*. *See Abela v. Gen. Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) (lower federal court decisions are not binding on state courts); *see also Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991) (collecting cases and literature expressing view that lower federal court decisions on questions of federal law do not bind the state courts).

In the end, while there always will be those rare and exceptional individuals who defy the odds and overcome the seemingly impossible obstacles to presenting a constitutional claim, the reality is that defendants who fall under MCL § 770.3a are the least likely to be able to protect their constitutional rights. Petitioners' request that the Court wait the years it could take for one of these individuals to appear should be rejected. *See Miller*, 523 U.S. at 474 (Breyer, J., dissenting) ("[F]orgo[ing] consideration of the constitutional merits to await another party's identical claim would foster repetitive and time-consuming litigation under the guise of caution and prudence.") (citation omitted).

III. MICHIGAN'S DEPRIVATION OF COUNSEL TO INDIGENT APPELLANTS VIOLATES CONSTITUTIONAL PRINCIPLES INDEPENDENT FROM THOSE UNDERLYING *DOUGLAS*

As Respondents aptly have illustrated, Michigan's deprivation of appellate counsel under MCL § 770.3a violates both due process and equal protection under the Fourteenth Amendment. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas v. California*, 372 U.S. 353 (1963). Appeals following guilty pleas in Michigan are not truly "discretionary" and the Constitution would mandate the appointment of counsel even if they were. The Court need go no further than *Douglas* and its progeny to

affirm the Sixth Circuit's decision striking down the Michigan system as unconstitutional.

But putting aside *Douglas*, Michigan's scheme independently violates the Constitution. *First*, Michigan's initial appeal for plea-based convictions—regardless of whether it is labeled "discretionary" or of right—constitutes a "critical stage" of criminal proceedings covered by the right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Second*, MCL § 770.3a abrogates the traditional and deeply rooted practice of providing counsel to indigents on initial appeal, itself an independent violation of due process.

A. Michigan's First Appeal Is a "Critical Stage" Requiring Counsel Under *Gideon*

On March 18, 1963, this Court issued both *Gideon* and *Douglas*. *Gideon*, of course, held that the right to counsel under the Sixth Amendment is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340 (quotation omitted). For its part, *Douglas*—relying not on the Sixth Amendment, but on due process and equal protection—held that an indigent defendant must be provided counsel for a first appeal as of right. *Douglas*, 372 U.S. at 357-58.

In the forty years since, this Court further defined the parameters of *Gideon* and *Douglas*. Expanding on *Gideon*, this Court deemed the Sixth Amendment's right to counsel so fundamental that it applies not only at trial, but to "all critical stages of the criminal process." *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Critical stages include "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (critical stage "denote[s] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused."). They are those stages involving "trial-like confrontations," such as where a defendant would need assis-

tance to confront either his adversary or a State's intricate procedural system. *See United States v. Ash*, 413 U.S. 300, 312 (1973). Accordingly, this Court has extended the right to counsel to steps in the criminal process that occur before and after trial, including sentencing. *See Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (arraignment is a critical stage); *United States v. Wade*, 388 U.S. 218, 237 (1967) (post-indictment line-up is a critical stage); *Mempa*, 389 U.S. at 137 (sentencing is a critical stage); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (sentencing is a critical stage) (plurality opinion).

Because every jurisdiction in the United States has provided counsel on first appeal under *Douglas*, this Court has never had to address whether an appeal like Michigan's initial appeal for plea-based convictions is a "critical stage" covered by *Gideon*. Where the *Gideon* and *Douglas* line of cases have intersected, however, this Court effectively has concluded that a first appeal on the merits, like Michigan's, is a critical stage. Specifically, in *Evitts v. Lucey*, this Court determined that the right to effective assistance of counsel under the Sixth Amendment—traditionally applied only to "critical stages"—applies to a defendant's first appeal of right. 469 U.S. 387, 396 (1985). Later in *Penson v. Ohio*, 488 U.S. 75 (1988), this Court applied the critical stage "presumption of prejudice" standard for ineffective assistance of counsel to defendants denied counsel on a first appeal:

> [T]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial . . . . Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice must extend as well to the denial of counsel on appeal.

Id. at 88 (citations omitted); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (quoting same).

These decisions compel the conclusion that, regardless of how it is labeled—whether "discretionary," of right, or some other type of appeal—the first appeal following a guilty plea in Michigan is a "critical stage" requiring the appointment of counsel. *First*, the initial appeal of a guilty plea in Michigan is a step "where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. In *Mempa*, for instance, this Court deemed sentencing a critical stage because the absence of counsel could result in the waiver of appellate rights. *Id.* at 135 ("Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage."); *see also Hamilton*, 368 U.S. at 54 (arraignment is critical stage because without counsel rights may be waived). Such risks already have come to fruition under Michigan's system. In *People v. Plaza*, 617 N.W.2d 687 (Mich. 2000), the Michigan Supreme Court summarily denied review of a case involving the State's purported failure to provide an indigent defendant a transcript to assist his *pro se* appeal. In her concurrence, Justice Corrigan justified the denial on the ground that the transcript issue had been waived because the indigent defendant failed to raise the error in his *pro se* Application for appeal. *See id.* at 687 (Corrigan, J., concurring). In her dissent, however, Justice Kelly cogently recognized that the case illustrated a fundamental flaw in Michigan's system:

> The concurrence points out that defendant failed to raise the issue in his application to the Court of Appeals. Defendant, untrained in law, may have been unaware of the consequences of failing to raise it. If so, this case illustrates why indigent defendants need the assistance of appointed appellate counsel, even when they have pleaded guilty. There is a distinct possibility that defendant was wrongly sentenced in this case. He is being denied a reasonable hearing because, lacking legal counsel, he did not follow the procedural requirements of appellate review.

Id. at 688 (Kelly, J., dissenting).

Second, aside from waiver, other substantial rights are affected on an initial guilty plea appeal in Michigan. Unlike truly "discretionary" second-tier appeals or collateral proceedings,[19] the initial appeal following a guilty plea is the first and only appeal aimed at correcting errors. Just as providing assistance of counsel at sentencing proceedings protects the improper imposition of a sentence, Michigan's initial appeal protects defendants from inevitable sentencing errors under the Michigan Sentencing Guidelines. *See Mempa*, 389 U.S. at 134-36. As for errors other than those related to sentencing, "[w]hile ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis." *Id.* at 136.

Third, the first appeal following a guilty plea is a "critical stage" because it requires a defendant to confront a State's intricate procedural system. *See Ash*, 413 U.S. at 311. As reflected above, Michigan's procedures for guilty plea appeals are no less formidable than appellate procedures following trial. Just because the appeal follows a guilty plea, "[t]he need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the

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[19] *See Ross v. Moffitt*, 417 U.S. at 615 ("We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been 'a correct adjudication of guilt' in every individual case, but rather whether 'the subject matter of the appeal has significant public interest' . . . . The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect.") (citations omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited . . . .").

appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over." *Penson*, 488 U.S. at 85.

To be sure, as Petitioners take pains to highlight, this Court has not yet recognized a Constitutional right to appeal. *See* Pet'rs Br. at 10, 27-29; *see also* Judge Kolenda Br. at 1, 17. And it is true that this Court also has never had occasion or need to address whether a first appeal (whether of right or otherwise) is a "critical stage" under *Gideon*, and in other contexts has stated that the right to counsel on appeal is generally covered by the Fourteenth, as opposed to Sixth Amendment. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160 (2000).

As a threshold matter, however, the critical stage analysis applies the right to counsel based upon the significance of the proceeding, not upon whether an accused has a right to the proceeding in the first instance. So, for example, an accused has a right to counsel at a preliminary hearing, even though he has no right to a preliminary hearing; during a lineup, even though he has no right to appear in a lineup; during a guilty or no contest plea proceeding, even though he has no right to plead guilty or no contest.

As for the constitutional underpinnings of the critical stage doctrine, because of uniform adherence to *Douglas*, this Court has never had need to apply the "critical stage" analysis under the Fourteenth Amendment. But the critical stage analysis—or something akin to it—is the analytical framework with which the Court has applied the right to counsel on appeal under the Fourteenth Amendment. In *Douglas*, the Court "undertook an examination of whether an indigent's access to the appellate system was adequate." *Ross*, 417 U.S. at 607. Based on that examination of the process involved in an appeal, the Court in *Douglas* found that facing the

California appellate "gantlet" without counsel "does not comport with fair procedure." *Douglas*, 372 U.S. at 357. Fair process at the appellate stage is also the centerpiece of the Court's decisions in *Penson v. Ohio*, 488 U.S. at 84 and *Anders v. California*, 386 U.S. 738, 744 (1967) (noting "constitutional requirement of substantial equality and fair process can only be attained where [appellate] counsel acts in the role of an active advocate").

Regardless, nothing prevents the application of the doctrine under *Gideon* and the Sixth Amendment here. This Court repeatedly has recognized that the "critical stage" doctrine warrants the expansion of the right to counsel under the Sixth Amendment "when new contexts appear presenting the same dangers that gave birth to the right [to counsel] itself." *Ash*, 413 U.S. at 311; *see also Wade*, 388 U.S. at 224-26. Michigan's appeals of plea-based convictions are one of those new contexts. Thus, even if Michigan's unprecedented denial of appellate counsel for indigent defendants who plead guilty can be said to evade the dictate of *Douglas* (which it does not), the deprivation of counsel runs afoul of the Constitution.[20]

B. Michigan's Scheme Unconstitutionally Abrogates a Traditional, Firmly Rooted Practice of Providing Indigents Counsel In Their First Appeal On the Merits

Citing *Smith v. Robbins*, 528 U.S. 259 (2000), Petitioners argue that the denial of counsel to those who plead guilty is permissible because Michigan is free "to experiment with

[20] Implicitly conceding the constitutional frailty of the Michigan scheme, Judge Kolenda and the amici States argue that the statutory denial of counsel should be excused because state law requires each defendant to waive the right to counsel for this critical stage. Judge Kolenda Br. at 17-20; State Amici Br. at 15-20. As Respondents and Amicus NLADA explain, this waiver justification itself violates the Fourteenth Amendment because the purported "waiver" applies only to the poor.

procedures for handling criminal appeals." Pet'rs Br. at 46; *see also* Judge Kolenda Br. at 20. In *Smith*, the Court recognized that an exception to the right to counsel under *Douglas* exists where appointed counsel, after carefully reviewing the record and examining the law, determines that any appeal would be frivolous. *Smith*, 528 U.S. at 264. This Court held that the states are free to adopt different procedures concerning counsel's ability to decline to pursue a frivolous appeal so long as the procedures adequately safeguard a defendant's right to counsel. *Id.* at 277-78. The Court in *Smith*, however, noted that there is a difference between procedures that protect the *effectiveness* of counsel versus those that deny counsel in the first instance. *Id.* at 286. Michigan's system does the latter, denying counsel outright. *Cf. Douglas*, 372 U.S. at 357 ("When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.").

In any event, even when viewed purely as a procedural issue, the "procedure" under MCL § 770.3a violates due process. In recent years, this Court has recognized that departures from traditional procedures—those derived from the common law or otherwise deeply rooted in our traditions and conscience—may independently violate due process. Such departures violate due process if the change "offends a principle of justice that is deeply rooted in the traditions or conscious of our people." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (citation omitted); *accord Medina v. California*, 505 U.S. 437, 445 (1992).

To determine whether a state's procedures offend a deeply rooted practice, this Court has compared the practice not only with those employed at common law, *Medina*, 505 U.S. at 445-46, but also modern practice. *See Cooper*, 517 U.S. at

360. These and other cases[21] reflect the constitutional infirmity of Petitioners' attempt to depart from what has been considered black-letter law since *Gideon* and *Douglas*.

Thus, even when viewed as a purely procedural issue, Michigan's departure from the traditional protections afforded indigent defendants cannot stand. No jurisdiction in modern history—not one—has deprived an indigent defendant the appointment of counsel on first appeal on the merits, even when the state employs a true "discretionary" first appeal. *See Bundy v. Wilson*, 815 F.2d 125, 136-42 (1st Cir. 1987) (describing appellate systems in all U.S. jurisdictions); *Tesmer*, Pet. App. 28a-29a & n.2 (noting that only three states do not allow a first appeal of right and all require appointment of counsel for the first appeal). Indeed, a Michigan federal court explicitly rejected the notion that a so-called "discretionary" appeal permits the deprivation of counsel. *Mata v. Egeler*, 383 F. Supp. 1091, 1093-94 (E.D. Mich. 1974). Courts, scholars, and defendants assume that from the initiation of charges through the first appeal "lawyers in criminal courts are necessities, not luxuries." *Gideon*, 372 U.S. at 344. Accordingly, completely independent of the Due Process and Equal Protection guarantees in *Douglas*, or the Sixth Amendment protections of *Gideon*, Michigan's scheme violates the Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the Sixth Circuit's decision striking down MCL § 770.3a and the practice of denying counsel to indigent defendants who plead guilty.

[21] *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (departure from precedent unwarranted because Miranda warnings have become part of "our national culture").

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN F. KOWALSKI, Judge,
26th Judicial Circuit Court of Michigan, *et al.*,

Petitioners,

v.

JOHN C. TESMER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE FACTS 3

ARGUMENT 4

Michigan Cannot Compel Indigent Defendants, And Only Indigent Defendants, To Waive Their Constitutional Right To Appointed Appellate Counsel As A Precondition For Entering A Plea Of Guilty Or No Contest. 4

A. The Unconstitutionality of Section 770.3a Pretermits Enforcement of Any Purported Waiver of the Constitutional Right to Counsel Under the Michigan Statute. 4

B. Demanding a Waiver of the Constitutional Right to Counsel by Indigent Defendants Who Wish to Plead Guilty or No Contest Violates the Equal Protection Clause of the Fourteenth Amendment. 7

Contents

		Page
1.	A waiver of the right to counsel on appeal is not an inherent incident of a guilty or no contest plea.	8
2.	The Equal Protection Clause forbids forcing indigent defendants to waive their right to appellate counsel. ...	10
3.	Compelled waivers of the right to appellate counsel deny indigent defendants substantial equality in the criminal appellate process. ...	12
CONCLUSION		18

TABLE OF CITED AUTHORITIES

Cases: *Page*

Barry v. Peterson, 887 F.2d 635 (5th Cir. 1989) ... 10

Boykin v. Alabama, 395 U.S. 238 (1969) 8

Brady v. United States, 397 U.S. 742 (1970) 8

Burns v. Ohio, 360 U.S. 252 (1959) 16

Champlin Rfg. Co. v. Corporation Comm'n of Okla., 286 U.S. 210 (1932) 6

County Road Ass'n of Mich. v. Governor, 677 N.W.2d 340 (Mich. Ct. App. 2004) 6

Douglas v. California, 372 U.S. 353 (1963) ...5, 7, 9, 17

Draper v. Washington, 372 U.S. 487, *cert. denied*, 374 U.S. 852 (1963) 16

Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958) 16

Fuller v. Oregon, 417 U.S. 40 (1974) 13, 14, 15

Griffin v. Illinois, 351 U.S. 12 (1956) 12, 13, 16, 17

Iowa v. Tovar, __ U.S. __, 124 S. Ct. 1379 (2004) ... 9

James v. Strange, 407 U.S. 128 (1972) 13, 14, 15

Cited Authorities

	Page
Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County, N.C., 149 F.3d 277 (4th Cir. 1998), *cert. denied*, 525 U.S. 1106 (1999)	10
Leavitt v. Jane L., 518 U.S. 137 (1996)	6
Lewis v. Casey, 518 U.S. 343 (1996)	13
McKane v. Durston, 153 U.S. 684 (1894)	9
Michigan State AFL-CIO v. Michigan Employment Relations Comm'n, 538 N.W.2d 433 (Mich. Ct. App. 1995), *aff'd*, 551 N.W.2d 165 (Mich. 1996)	6
M.L.B. v. S.L.J., 519 U.S. 102 (1996)	13, 16, 17
Parrish v. Fulcomer, 150 F.3d 326 (3d Cir. 1998)	10
Penson v. Ohio, 488 U.S. 75 (1988)	17
People v. Bulger, 614 N.W.2d 103 (Mich.), *cert. denied*, 531 U.S. 994 (2000)	8
Pletz v. Secretary of State, 336 N.W.2d 789 (Mich. Ct. App. 1983)	6
Smith v. Robbins, 528 U.S. 259 (2000)	12-13
Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003)	5, 9

Cited Authorities

	Page
Tollett v. Henderson, 411 U.S. 258 (1973)	8
Town of Newton v. Rumery, 480 U.S. 386 (1987)	10
United States v. Andis, 333 F.3d 886 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 124 S. Ct. 501 (2003)	11
United States v. Elliott, 264 F.3d 1171 (10th Cir. 2001)	11
United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (*en banc*)	11
United States v. Mezzanatto, 513 U.S. 196 (1995)	10, 11, 12
United States v. Teeter, 257 F.3d 14 (1st Cir. 2001)	11
Wheat v. United States, 486 U.S. 153 (1988)	12
United States Constitution:	
Sixth Amendment	12
Fourteenth Amendment	7

Page

Statutes:

18 U.S.C. § 3742 11

42 U.S.C. § 1983 10

MICH. COMP. LAWS § 8.5 6

MICH. COMP. LAWS § 770.3a 7, 9

MICH. COMP. LAWS § 770.3a(1) 4, 5

MICH. COMP. LAWS § 770.3a(2) 4, 5

MICH. COMP. LAWS § 770.3a(4) 4, 5

Rules:

Mich. Ct. R. 6.302 ..... 5, 7

Mich. Ct. R. 6.302(B) 4, 5

Mich. Ct. R. 6.302(B)(5) 5

Mich. Ct. R. 6.302(B)(6) 5

Page

Other Authorities:

MICH. CONST. ART. I, § 20 4

Mara Matuszak, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. DET. MERCY L. REV. 431 (1996) 17

INTEREST OF AMICUS CURIAE[1]

The National Legal Aid and Defender Association (NLADA), a nonprofit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members.

NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of its efforts, NLADA has filed *amicus curiae* briefs in major constitutional cases before this Court that involve the administration of the criminal justice system and the right to counsel.

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the National Legal Aid and Defender Organization and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

NLADA submits this *amicus curiae* brief because it believes that the Michigan statute's denial of appellate counsel to indigent defendants who enter guilty or no contest pleas violates equal protection guarantees and will leave indigent defendants unable to mount any meaningful challenge to excessive sentences or other errors in the plea proceedings. NLADA is particularly concerned that the position advanced by petitioners' *amici*, under which states would be free to condition pleas by indigent defendants – and indigent defendants only – on a waiver of the right to appellate counsel, even if that right is reaffirmed as a constitutional guarantee for indigent defendants who enter guilty or no contest pleas, would have serious constitutional and practical ramifications.

SUMMARY OF ARGUMENT

Both petitioners' *amici* and respondent Kolenda argue, as an apparent alternative basis for overturning the Sixth Circuit's decision, that Michigan is free to compel waivers of the right to appointed appellate counsel. Petitioners' *amici* frankly admit their interest in the question whether their states are free to adopt Michigan's practice of compelling a waiver of an indigent defendant's right to appellate counsel. That is, even if the Court upholds the Sixth Circuit's decision that the right to appointed counsel indeed obtains on appeals from plea-based convictions, *amici* would have the Court hold that a state may compel a waiver of that right as an essential precondition to acceptance of a guilty or no contest plea.

The statutory provision that requires a trial court to ascertain that an indigent defendant entering a plea understands that the defendant will not be provided with appointed appellate counsel is an essential part of the Michigan statute's overall fabric. The statute's unconstitutionality dooms the attempt by Kolenda and petitioners' *amici* to salvage the waiver provision as a freestanding enactment, under which Michigan can compel

waivers of appellate counsel. But even if that were not so, the broader question is whether a state (or an individual judge) can compel a waiver of the right to appointed appellate counsel as a precondition for acceptance of a plea. The equal protection violation that arises from the "waiver" theory advanced by petitioners' *amici* is identical to, if not more egregious than, that which arises from Michigan's attempt to legislate away the constitutional right of indigent defendants to appointed appellate counsel in the first instance.

Respondent Kolenda and petitioners' *amici* would have the Court rule that indigent defendants – and only indigent defendants – can be compelled to surrender their right to appellate counsel if they wish to enter a guilty or no contest plea. A moneyed defendant would, of course, be free to retain appellate counsel on appeal from a plea-based conviction. This invidious discrimination is utterly inconsistent with the principles that sustain the right to appointed appellate counsel.

Petitioners' *amici*, in trumpeting their theory, argue that defendants may reject the enforced waiver of appellate counsel by going to trial. But petitioners' *amici* well know that the vast majority of felony charges against indigent defendants are resolved by pleas, and that the choice they would impose is an illusory one at best. More to the point, petitioners' *amici* would foist this "choice" *only* upon indigent defendants.

STATEMENT OF THE FACTS

NLADA adopts the Statement of the Facts in respondent's brief.

ARGUMENT

Michigan Cannot Compel Indigent Defendants, And Only Indigent Defendants, To Waive Their Constitutional Right To Appointed Appellate Counsel As A Precondition For Entering A Plea Of Guilty Or No Contest.

A. The Unconstitutionality of Section 770.3a Pretermits Enforcement of Any Purported Waiver of the Constitutional Right to Counsel Under the Michigan Statute.

Article I, Section 20, of the Michigan Constitution (as amended in 1994), requires leave of court for an appeal of a criminal conviction following a guilty or no contest plea. Pursuant to a statute that the Michigan legislature enacted in 2000, indigent defendants "shall not have appellate counsel appointed for review of the defendant's conviction or sentence" in seeking leave to appeal. MICH. COMP. LAWS § 770.3a(1). Counsel may be appointed only if the prosecution takes an appeal, the sentence is beyond the outer limits of the guideline range, the defendant has entered a conditional appeal, or if leave is granted for an appeal. MICH. COMP LAWS § 770.3a(2). There is no dispute that the 2000 statute was intended to – and did – deny appointed counsel to most indigent defendants who plead guilty or no contest. Brief for the Petitioners at 29, 33-34, 36-37; Brief of the States of Iowa, *et al.* as *Amici Curiae* in Support of Petitioner (Amici's Brief) at 19-20.

Michigan Court Rule 6.302(B), in compliance with the statute, MICH. COMP. LAWS § 770.3a(4), requires that a trial court that accepts a guilty or no contest plea to "advise the defendant and . . . determine whether the defendant understands": (i) that "any appeal from the conviction and sentence" is by "application for leave to appeal and not by right"; and (ii) that the defendant

is not entitled to appointed counsel except in the circumstances set forth in Section 770.3a(2). Mich. Ct. R. 6.302(B)(5), (6). Based on this rule, respondent Kolenda and petitioners' *amici* argue (as noted in respondents' brief, for the first time before this Court, Brief for Respondents at 41) that – even if the right to counsel under *Douglas v. California*, 372 U.S. 353 (1963), extends to appeals from convictions entered on guilty or no contest pleas, as the Sixth Circuit held, *Tesmer v. Granholm*, 333 F.3d 683, 695-701 (6th Cir. 2003) (*en banc*), – Mich. Ct. R. 6.302 is a valid exercise of Michigan's purported power to compel indigent defendants to waive their right to appellate counsel as a prerequisite to acceptance of indigents' guilty or no contest pleas. Brief of Respondent Kolenda (Kolenda Brief) at 17-20; Amici's Brief at 15-21.

There is considerable irony in the promulgation of this theory. Rule 6.302(B) effectuates Section 770.3a(4), which statute requires that a trial court "shall advise the defendant that, . . . if the plea is accepted by the court, the defendant waives the right to have an attorney appointed at public expense to assist in filing an application for leave to appeal . . . and shall determine whether the defendant understands the waiver." § 770.3a(4), MICH. COMP. LAW. Kolenda and petitioners' *amici*, however, would have the Court hold that Section 770.3a(4) and Rule 6.302(B) should survive a declaration that Section 770.3a(1) is unconstitutional, such that Michigan – which promulgated the statute and rule to enforce its determination that there is no right to appellate counsel on appeal from plea-based convictions – can use subsection (4) to enforce a waiver of the constitutional right to appellate counsel once its statute is stricken as unconstitutional.

While a declaration that one section of a statute is unconstitutional "does not necessarily defeat or affect the validity of its remaining provisions," the unconstitutional provision can

be treated as severable only "if what is left is fully operative as law," such that the legislative body would have enacted the remaining provisions independently of the unconstitutional section. *Champlin Rfg. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (citations omitted). "Severability is of course a matter of state law," requiring this Court to determine whether an unconstitutional provision can be stricken, while leaving the remainder of the statute enforceable under state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996).

Michigan follows the usual rule that, "[i]f a portion of an act is invalid, a court should enforce the remainder to the extent that it can be given effect consistent with the legislative intent underlying the act." *County Road Ass'n of Mich. v. Governor*, 677 N.W.2d 340, 348 (Mich. Ct. App. 2004) (citation omitted).[2] "To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself." *Pletz v. Secretary of State*, 336 N.W.2d 789, 809 (Mich. Ct. App. 1983) (footnote omitted). One test for making that determination "is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised." *Id.* (footnote omitted). "When the valid object of the act can be achieved without the invalid part, the act will be upheld." *Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, 538 N.W.2d 433, 447 (Mich. Ct. App. 1995) (citation omitted), *aff'd*, 551 N.W.2d 165 (Mich. 1996).

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2 By statute, "[i]f any portion of an act . . . shall be found to be invalid by a court, such invalidity shall not affect the remaining portions . . . which can be given effect without the invalid portion . . . , and to this end acts are declared to be severable." MICH. COMP. LAWS, § 8.5.

Neither Kolenda nor petitioners' *amici* even attempt to argue that subsection (4) can reasonably be seen as severable from the remainder of Section 770.3a. No such construction is possible: subsection (4) merely enforces the purported lack of entitlement to appointed counsel that Michigan enacted in subsection (1). And Mich. Ct. R. 6.302 merely further effectuates the statutory directive. Subsection (4) was not adopted to work a waiver of the right to counsel, but to effectuate a legislative determination that *no right to counsel* exists for appellate review of plea-based convictions. Because that provision is not severable, the waiver theory advanced by Kolenda and petitioners' *amici* fails at the outset.

B. Demanding a Waiver of the Constitutional Right to Counsel by Indigent Defendants Who Wish to Plead Guilty or No Contest Violates the Equal Protection Clause of the Fourteenth Amendment.

As respondents correctly note, the newly-minted "waiver" argument itself gives rise to an equal protection violation. Reduced to its essence, that argument would mean that the states are required, as a matter of Fourteenth Amendment law, to provide appellate counsel to indigents who plead guilty or no contest, but that the states may deny that right as a condition of a guilty or no contest plea, thus effectively denying meaningful appellate review to indigents who do not elect to go to trial.[3] This facile attempt to avoid the implications of a ruling that *Douglas* extends to Michigan's appellate procedure for appeals from convictions entered on guilty or no contest pleas cannot succeed.

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3. See Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders in Support of Respondents at 8-18.

1. A waiver of the right to counsel on appeal is not an inherent incident of a guilty or no contest plea.

It is unacceptable for *amici* to argue, as they do, that the "waiver" they wish to have the Court create is in any respect analogous to the well-recognized waiver of trial rights that is necessarily worked by a guilty or no contest plea. Amici's Brief at 16. There is a dispositive distinction:

> [A] guilty plea represents a break in the chain of events *which has preceded it* in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.*

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added). So it is that a guilty plea waives the right to a jury trial, the privilege against self-incrimination, and the right to confront one's accusers. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).[4]

That a guilty or no contest plea waives significant constitutional rights necessarily limits the scope of potential appellate issues following a conviction entered on a plea. But

4 The Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich.), *cert. denied*, 531 U.S. 994 (2000), sets forth a list of "issues" that a defendant waives by entering a guilty or no contest plea, *e.g.*, "search and seizure claims," issues "relating to the defendant's factual guilt and the prosecution's ability to prove the case," and denial of speedy trial. *Id.* at 112 n.7. Of course, those "issues" are conceptually no different from the constitutional rights identified in *Brady* and *Boykin*, in that they stem from *pre-guilty plea* proceedings and events.

petitioners, while relying on the purported absence of a federal constitutional right to a criminal appeal, Brief for Petitioners (Kowalski Brief) at 27 (citing *McKane v. Durston*, 153 U.S. 684 (1894)), recognize, as they must, that Michigan has provided an appellate framework for appeals from convictions entered on guilty or no contest pleas. *Id.* at 35-37. That framework exists *only* for appeals from guilty or no contest pleas. *Id.* There is thus no basis for arguing that, in Michigan, a guilty or no contest plea inherently waives the right to an appeal for *any* defendant, moneyed or indigent.[5]

The "waiver" argument thus founders on the same constitutional principle that invalidates Section 770.3a, *i.e.*, it would "create a different opportunity for access to the appellate system based upon indigency." *Tesmer*, 333 F.3d at 701. It is *only* indigent defendants who, according to Kolenda and petitioners' *amici*, must waive the right to appellate counsel to enter a guilty or no contest plea in Michigan. But this Court in *Douglas* left no room for doubt that "discrimination against the indigent" on a matter so fundamental as the right to counsel is an "evil," because "there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 (citation omitted). The argument advanced by petitioners' *amici* would, carried to its logical extent, authorize a judge – in a jurisdiction that does not have Michigan's unique statutory scheme – simply to announce that

5. Petitioners' *amici* purport to find support in *Iowa v. Tovar*, __ U.S. __, 124 S. Ct. 1379 (2004). Amici's Brief at 16. But *Tovar* holds only that a defendant "may choose to forgo representation" in pleading guilty," *id.* at 1387, that the defendant in that case had done so, and that additional admonitions required by the Iowa Supreme Court were not constitutionally required. *Id.* at 1388-90. Nothing in *Tovar* supports the notion that an indigent defendant can be *compelled* to waive the right to appointed appellate counsel as a precondition to entering a guilty or no contest plea.

he or she will not accept a guilty plea from an indigent defendant unless that defendant waives the right to appellate counsel.

2. The Equal Protection Clause forbids forcing indigent defendants to waive their right to appellate counsel.

As this Court has recognized, criminal defendants face "difficult choices" in the "plea bargaining process" when compelled to weigh "the risk of more severe punishment" after a trial against "substantial benefits in return for the plea." *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (citations omitted). But "the imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id.* at 210 (citations and internal quotations omitted). The prosecution may offer to condition a plea on a defendant's waiver of rights that are not inherently waived by a guilty plea and, if the defendant's waiver is knowing and voluntary, the bargain will be upheld. *Id.* at 210-11 (upholding plea agreement that included defendant's waiver of protections against use of statements made in course of plea discussions); *see Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) (voluntary "release-dismissal agreement," in which defendant waived right to 42 U.S.C. § 1983 action in exchange for dismissal, is constitutionally valid); *Barry v. Peterson*, 887 F.2d 635, 639-40 (5th Cir. 1989) (upholding defendant's execution of covenant not to sue county for injuries suffered in jail as part of plea bargain). *See also Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) (upholding defendant's waiver of jury trial in exchange for state's agreement not to seek death penalty); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County, N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) ("[t]he contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest") (citation omitted), *cert. denied*, 525 U.S. 1106 (1999).

The courts of appeal have addressed waivers of the right to appeal as a component of a plea bargain. *E.g.*, *United States v. Hahn*, 359 F.3d 1315, 1324-27 (10th Cir. 2004) (*en banc*); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 124 S. Ct. 501 (2003); *United States v. Teeter*, 257 F.3d 14, 23-26 (1st Cir. 2001). Such waivers must, of course, be knowing and voluntary, and are subject to being set aside to allow appellate review when a miscarriage of justice would result from enforcement. *E.g.*, *Hahn*, 359 F.3d 1324-28. It goes without saying that such waivers are not imposed by federal law: indeed, an appeal from a plea-based conviction is allowed as a matter of right under 18 U.S.C. § 3742 for a challenge to the legality of the sentence. *Hahn*, 359 F.3d at 1320-22. And there is no limitation on the right to counsel that mirrors Michigan's coercive scheme.

In the context of negotiated waivers of the right to appeal, a miscarriage of justice will be found "where the district court relied on an impermissible factor, such as race." *Hahn*, 359 F.3d at 1327 (citation omitted); *accord*, *e.g.*, *Andis*, 333 F.3d at 891; *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001). Michigan's requirement that indigent defendants waive their right to appellate counsel to enter a guilty or no contest plea is indisputably based on a wealth-based distinction, because only poor defendants are required to waive the right in order to enter a plea.

Thus, waivers of constitutional rights that would pass muster under *Mezzanatto*'s rationale, or under the rationale that permits voluntary waivers of the right to appeal, are fundamentally different from the "waiver" that petitioners' *amici* would have the Court approve here. It is one thing for the prosecution to negotiate a plea agreement that includes waivers other than those that are inherent in every guilty or no contest plea, and quite another for Michigan to *compel* a waiver of the

right to appellate counsel as a precondition to accepting such a plea by an indigent defendant – when no such waiver is demanded of a moneyed defendant.

This Court declined to enforce a waiver of a fundamental right – even when that waiver was freely negotiated between the prosecution and defense – in *Wheat v. United States*, 486 U.S. 153 (1988). The defendant had waived his Sixth Amendment right to be represented by conflict-free counsel, but the Court rejected the purported waiver because to allow the defendant to be represented by an attorney with a conflict of interest "constitutes a breach of professional ethics and invites disrespect for the integrity of the court." *Id.* at 162 (citation omitted). And, more recently, the Court recognized in *Mezzanatto* that, while the waiver of the protection against use of statements made during plea negotiations in that case was constitutionally acceptable, "[t]here may be some evidentiary protections that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" 513 U.S. at 204 (citations omitted). The forced extraction of a waiver advocated by petitioners' *amici* would indeed bring discredit upon the criminal justice system by institutionalizing discrimination against criminal defendants, solely on the basis of their indigency.

3. Compelled waivers of the right to appellate counsel deny indigent defendants substantial equality in the criminal appellate process.

This Court has often addressed equal protection concerns in the context of criminal appellate review, beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and more recently reaffirming that "an indigent must receive 'substantial equality' compared to the legal assistance that *a defendant with paid counsel would receive.*" *Smith v. Robbins*, 528 U.S. 259, 277

n.9 (2000) (citation omitted; emphasis added). That "substantial equality" requires, at a minimum, that an indigent defendant, "in *all* cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 278 n.10 (citations omitted; emphasis added). The *Griffin* principle – which "reflect[s] both equal protection and due process concerns," *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (citation omitted) – safeguards the "right of *access to the courts.*" *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (original emphasis). Michigan demands that indigent defendants must surrender perhaps the most essential component of the right of access to appellate review, *i.e.*, the assistance of a zealous appellate advocate in order to enter a guilty or no contest plea.

An insidious deprivation of equal protection lies beneath the suggestion of petitioners' *amici* that "Michigan has presented defendants with a choice – they may plead not guilty, in which case they will be afforded all of their procedural rights (including their right to counsel on appeal) or they may forego all of these rights by pleading guilty." Amici's Brief at 14. What is missing from this bland recitation is this: only indigents have to make the "choice" that Michigan demands.

The analytical flaw in the *amici*'s simplistic formulation is perhaps best demonstrated by this Court's decisions in *James v. Strange*, 407 U.S. 128 (1972), and *Fuller v. Oregon*, 417 U.S. 40 (1974). In *James*, the Court invalidated a recoupment statute that allowed Kansas to recover the costs of appointed counsel by imposing a lien on the indigent defendant, and which deprived the defendant of "any of the exemptions . . . for other judgment debtors except the homestead exemption." *Id.* at 130-31. That provision "strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of

disposable earnings subject to garnishment." *Id.* at 135. Moneyed defendants who hired their own lawyers, however, faced no such disadvantage:

> The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under . . . the Kansas Code of Civil Procedure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

Id. at 136-37.

The Court held that "to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes." 407 U.S. at 140-41. And the Court spoke in no uncertain terms in condemning the statute:

> We . . . recognize that state recoupment statutes may betoken legitimate state interest. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors. . . . The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.

Id. at 141-42.

In contrast, in *Fuller*, payment under the Oregon recoupment statute required that the defendant be able to pay, taking into account the defendant's resources, and also allowed for remission. 417 U.S. at 45. As the Court observed, the statute

was "quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation." *Id.* at 46. The Court distinguished *James v. Strange*, primarily because "[t]he convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors," as well as the right to seek to remit the debt upon a showing of hardship. *Id.* at 47-48. Thus, although only indigent defendants were within the scope of the recoupment statute, their debt was treated no differently than the debt of a moneyed defendant to retained counsel. *Id.* at 48 (statute "is wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause").

James and *Fuller* elucidate the egregious equal protection flaw that is inherent in the waiver theory. The requirement that indigent defendants – and *only* indigent defendants – must waive their right to appellate counsel if they wish to enter a guilty or no contest plea, while moneyed defendants are free to pursue their right to seek leave to appeal *with the assistance of counsel*, like the Kansas recoupment statute that was struck down in *James*, "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." 407 U.S. at 141-42.

As respondents note, the logical import of the waiver argument of petitioners' *amici* is that Michigan, if it can force indigent defendants to surrender their right to appellate counsel in exchange for allowing indigents to plead guilty, could similarly require that indigent defendants surrender a plethora of other rights, for example, their rights to a transcript at state expense and to file an appeal without a filing fee. Brief of Respondents at 42-43. There is no impediment to those results in the analysis that petitioners' *amici* advance to support their waiver theory.

Petitioners' *amici* argue that Michigan has "a strong interest in obtaining guilty pleas and in ensuring finality of the resulting convictions," such that Michigan "may attempt to finalize" such convictions by compelling a waiver of appellate counsel. Amici's Brief at 18-19. The same could easily be said in support of requiring indigents to pay filing fees for an appeal or to deny indigent defendants access to a transcript, the unfairness of which this Court, in unbroken lineage, has long decried. *E.g.*, *Draper v. Washington*, 372 U.S. 487, 496 ("the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"), *cert. denied*, 374 U.S. 852 (1963); *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (imposition of filing fees on indigent defendant violates equal protection); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 215-16 (1958) (indigent defendant entitled to free transcript); *Griffin*, 351 U.S. at 19 ("[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts"). Indeed, *Griffin*'s equal protection values relate precisely "to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *M.L.B.*, 519 U.S. at 120 (citation omitted).

What is at stake is thus nothing less than the entire panoply of protections that the Court has erected to protect the rights of indigent criminal appellants.[6] Petitioners' *amici* well know that

6 That this is so – and that the Court's decision will have an impact far beyond Michigan – is shown by the statement in the brief of petitioners' *amici* that, while none of the states who have submitted the brief "have adopted rules like the specific Michigan rule at issue here, these States have an interest in the broader constitutional question of what measures they may take in furtherance of their strong interest in the finality of guilty pleas, and the related question of when those measures may be subject to a facial challenge." Amici's Brief at 1-2.

the vast majority of criminal prosecutions of indigent defendants are resolved by plea-based convictions. *See* Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders in Support of Respondents at 6-7. If the states can insulate plea-based convictions from appellate review by compelled "waivers" of rights that this Court has proclaimed as necessary to ensure fairness for indigents in the appellate process, the states may well achieve the "finality" for which petitioners' *amici* advocate, but at the cost of insulating errors – including excessive sentences – from appellate review by indigent defendants. *See* Mara Matuszak, *Limiting Michigan's Guilty and Nolo Contendere Plea Appeals*, 73 U. DET. MERCY L. REV. 431, 440-43 (1996) (noting varying estimates of percentage of defendants who obtained relief on appeals from plea-based convictions before adoption of amendment to Section 20). That scenario invokes the due process imperative that informs the *Griffin-Douglas* rationale, *i.e.*, "the essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B.*, 519 U.S. at 120 (citation omitted).

Indeed, this Court has said that, "[b]ecause the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage . . . the presumption of prejudice must extend . . . to the denial of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Yet, the waiver theory propounded by petitioners' *amici* would institutionalize the denial of appellate counsel to indigent defendants as a condition precedent to acceptance of a guilty or no contest plea. The scheme *amici* propose would demand that indigent defendants, unlike their moneyed counterparts, must accept a presumptively prejudiced appellate framework or take their chances at trial. *See* Amici's Brief at 14. Enforcing that harsh choice hardly does credit to the courts that must strip impoverished defendants of their right to counsel, or to the overarching statutory scheme that compels the courts to do so.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT
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JOHN F. KOWALSKI,
Judge of the 26th Circuit Court
of Michigan, et al
Petitioners

v

JOHN C. TESMER, et al
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR WAYNE COUNTY, MICHIGAN AS AMICUS, SUPPORTING PETITIONER

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Statement of The Question

I.

Through its Constitution, Michigan provides an appeal of right to all defendants convicted by trial but only a discretionary appeal by leave to those convicted by plea. Michigan statute prohibits the appointment of counsel for those convicted by plea except in specified circumstances, some of which *require* the appointment of counsel. Does anything in the United States Constitution require a State to appoint counsel for an indigent defendant to file a discretionary appeal from a plea of guilty?

Statement of Facts

Amicus joins in the Statement of Facts of the Petitioner.

TABLE OF CONTENTS

Statement of the Question ..... -i-

Index of Authorities ..... -ii-

Statement of Facts ..... -i-

Argument ..... -1-

I. Introduction ..... -1-

A. The Michigan Constitutional and Statutory Scheme ..... -1-
B. The 6th Circuit Opinion ..... -2-

II. The Due Process and Equal Protection Clauses .... -5-

A. Due Process and Appeals ..... -5-
B. Equal Protection and Appeals ..... -8-

III. "Access to The Courts" ..... -13-

A. Griffin, Douglas, and Moffitt ..... -13-
B. "Access to the Courts" and the "Prisoner's Rights" Cases ..... -18-

IV. Conclusion ..... -23-

Relief ..... -24-

TABLE OF AUTHORITIES

FEDERAL CASES

Black v Secretary of Health and Human Services,
93 F.3d 781 (CA Fed, 1996).....11

Bounds v Smith,
430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72
(1977) 19

Griffin v Illinois,
351 U.S. 12, 76 S. Ct. 585,
100 L. Ed. 891 (1956) 7

Harris v McRae,
448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784
(1980) 12

Ex parte Hull,
312 U.S. 546, 61 S. Ct. 640,
85 L. Ed. 1034 (1941).....18

Johnson v Avery,
393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718
(1969) 18

Keevan v Smith,
100 F.3d 644 (CA 8, 1996).....11

Lewis v Casey,
518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) 20

M.L.B. v S.L.J.,
519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996).....4

Mays v City of East St. Louis,
123 F.3d 99 (CA 7, 1997) 5

McKane v Durston,
153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894) .6

McLean v Crabtree,
173 F.3d 1176 (CA 9, 1999).....11

National Labor Relations Board v International Brotherhood of Electrical Workers,
481 U.S. 573, 107 S. Ct. 2002, 95 L. Ed. 2d 557 (1986).....4

Pennsylvania v Finley,
481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).....7

Ross v Moffitt,
417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974) 1

San Antonio Independent School District v Rodriquez,
411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) 8

Smith v Boyle,
144 F.3d 1060 (CA 7, 1998) 11

Tesmer v Granholm,
333 F.3d 636 (CA 6, 2003) 2

Tucker v United States Department of Commerce,
958 F.2d 1411 (CA 7, 1992) 12

Village of Arlington Heights v Metropolitan Housing Development,
429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) 11

Wainwright v Torna,
455 U.S. 5 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) 17

Washington v Davis,
426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).....10

Wilson v Yaklich,
148 F.3d 596 (CA 6, 1998) 12

Wolff v McDonnell,
418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) 19

OTHER

John Hart Ely, *Democracy and Distrust* (1980).....5

Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 23

Argument

I.

A defendant is not constitutionally entitled to the appointment of counsel to prepare a discretionary application for leave from his conviction by way of a plea of guilty.

The precise rationale for the Griffin *and* Douglas *lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached....* [1]

I. Introduction

A. <u>The Michigan Constitutional and Statutory Scheme</u>

In Article 1, § 20, the Michigan Constitution provides a right of appeal to those convicted in criminal cases, except that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." The restriction to a discretionary appeal by leave for those convicted by way of a plea was added by the People of the State in 1994, approving a ballot proposal to achieve this result.[2] As a consequence, the Michigan legislature enacted MCL 770.3a, which prohibits the appointment of counsel for preparation of

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1. *Ross* v *Moffitt*, 417 US 600, 94 S Ct 2437, 41 L Ed 2d 341 (1974).

2. 1994 Senate Joint Resolution D, ratified at the November 8, 1994, general election as Ballot Proposal B.

the application for leave to appeal from a conviction by plea, with certain exceptions. Counsel *must* be appointed:

- If the prosecuting attorney seeks leave to appeal;
- if the defendant's sentence exceeds the upper limit of the minimum range of the sentencing guidelines;
- if the defendant seeks leave to appeal from a conditional plea; and
- if the Court of Appeals or Supreme Court grants the defendant's application for leave to appeal.

Further, the trial court has the discretion to appoint counsel where:

- the defendant seeks leave where the sentence is based on an alleged improper scoring of an offense or prior record variable, *and*
- the defendant objected to the scoring or otherwise preserved the issue for appeal, *and*
- the sentence imposed constitutes an upward departure from the upper limit of the minimum range if the guidelines were scored as the defendant claims appropriate.

B. <u>The 6th Circuit Opinion</u>

In its opinion[3] the Sixth Circuit, overturning the panel decision, and disagreeing with the Michigan Supreme Court, affirmed a district court order enjoining certain Michigan judges from failing to appoint counsel for defendants

3. *Tesmer v Granholm*, 333 F3d 636 (CA 6, 2003).

convicted by way of plea of guilty who wish to avail themselves of Michigan's appeal procedure for those who are convicted by plea–an application for leave, seeking discretionary review in the Michigan Court of Appeals. The result is that some judges in the State are enjoined, while the rest of the judges in the State are not, the Michigan statute that prohibits appointment of counsel for defendants who have been convicted by plea for preparation of an application for leave other than in specified circumstances has been held unconstitutional, and a Michigan Supreme Court decision (from which this Court denied certiorari) is cast aside.[4] Principles of neither due process nor equal protection support the decision of the Sixth Circuit.

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue, for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context,

> Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the (provision). ...there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the (text) that obedience to text must overcome fidelity to logic.....: "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a

4. *People v Bulger*, 462 Mich 495, 614 N.W.2d 103 (2000), cert. denied, 531 US 994, 121 S Ct. 486, 148 L Ed 2d 459 (2000).

> reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"[5]

Amicus thus begins with the relevant text.

> The 14th Amendment provides, in relevant part: No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The search for a possible constitutional basis for a right to counsel on a first appeal when that appeal is discretionary with the appellate court is difficult, and the cases from this Court are often less than clear, complicating the matter, for to this day "(t)he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated." *Ross v Moffitt*, supra. Amicus will look to Due Process and Equal Protection principles,[6] beginning the hunt with the Due Process Clause.

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5. *National Labor Relations Board* v *International Brotherhood of Electrical Workers*, 481 US 573, 107 S Ct 2002, 95 L Ed 2d 557 (1986)(Scalia, concurring).

6. Justice Thomas has said in a closely related context: "I therefore analyze petitioner's claim under both the Due Process and Equal Protection Clauses. If neither Clause affords petitioner the right...(claimed), I assume that no amalgam of the two does." *M.L.B.* v *S.L.J.*, 519 US 102, 117 S Ct 555, 136 L Ed 2d 473 (1996) (Thomas, J, dissenting, 117 S Ct at 570).

II. The Due Process and Equal Protection Clauses

A. Due Process and Appeals

It is not necessary in this case to step into the quagmire that is the oxymoron of "substantive due process."[7] On any plausible reading of the text the Due Process Clause sets *no* "right" of persons beyond the reach of government, instead specifically providing that an individual *can* in fact be deprived by the State of his or her property (in whatever aspect), his or her liberty (in whatever aspect), and even his or her very *life*, the Clause containing the limitation that any such deprivation *must* occur in accordance with "due process of law," which protection plainly is, then, a procedural guarantee. How a constitutional provision which expressly authorizes the taking of life, liberty, or property, so long as in accordance with due process of law, has come to be viewed as mandating recognition of certain interests which are "undeprivable" no matter the sort of process provided, remains something of a mystery.

Here, though, "substantive" process plays no part, for this case concerns the Due Process Clause in its obvious procedural form, at issue being the quintessential "liberty"

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7. "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' ... Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.' " John Hart Ely, *Democracy and Distrust*, p. 18 (1980). See also *National Paint* v *City of Chicago*, 45 F3d 1124, 1128 (CA 7, 1995) ("Plaintiffs...assert...that the ordinance is a violation of substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it"); *Mays* v *City of East St. Louis*, 123 F3d 99, 1001 (CA 7, 1997)("...'substantive due process' is an oxymoron").

interest of individuals, deprivation of which by the State is contingent upon due process of law–a criminal conviction results in the loss of liberty either by confinement or through restrictions associated with probation, and perhaps some loss of property through fine. This deprivation of liberty must, as commanded by the 14th Amendment, occur in accordance with "due process" of law. The bulk of the process which is "due" a criminally accused appears in specific portions of the Bill of Rights, applied to the States through the doctrine of selective incorporation. Thus, the accused is protected by, among others, principles of double jeopardy, the right against self-incrimination, the right to a speedy trial, the right to a public trial, the right to fair notice (to be informed of the nature and cause of the accusation), the right to confrontation, the right to compulsory process, and the right to the effective assistance of counsel. Other requirements essential to fair procedure have been identified, which generally are subsidiary to these rights, such as the right to an impartial judge, the right to an impartial jury, the right not to be compelled to trial garbed in identifiable jail clothing (thereby compromising the right to an impartial fact-finder), and so on. But what of the right to appellate review? Is there a right under the Due Process Clause to appellate review of a criminal conviction as a necessary requisite to the deprivation of liberty permitted by that Clause so long as in accordance with due process?

The answer, of course, is "no," as has been established for over a century. The lead case is *McKane* v *Durston*.[8] There the accused was convicted at trial with election fraud and sentenced to Sing Sing prison for six years. He was neither entitled to bail nor admitted to discretionary bail, and claimed a constitutional right to bail pending appeal; in essence, he claimed that he was due the "process" of an appeal *before* his liberty could constitutionally be restrained.

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8. *McKane* v *Durston*, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894).

Writing for a unanimous Court, the first Justice Harlan observed that

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. It is therefore clear that the right of appeal may be accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper.*[9]

The point has been reiterated time and again.[10] After all, no appeals from convictions in the federal courts were permitted until late in the 19th century.[11]

It ineluctably follows from the fact that the process which is "due" before liberty may be taken by way of a criminal prosecution does not include the right to appellate review that when appellate review *is* provided it may, at least

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9. 153 US at 687, 14 S Ct at 915 (emphasis supplied).

10. See *Griffin* v *Illinois*, 351 US 12, 76 S Ct 585, 590, 100 L Ed 891 (1956)("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); *Ross v Moffitt*, supra, 94 S Ct at 2442 ("...a State is not obliged to provide any appeal at all for criminal defendants"); *Pennsylvania* v *Finley*, 481 US 551, 107 S Ct 1990, 1993, 95 L Ed 2d 539 (1987)("...it is clear that the State need not provide any appeal at all"); *M.L.B. v S.L.J.*, supra, 117 S Ct at 560 ("...the Federal Constitution guarantees no right to appellate review....").

11. See *Griffin v Illinois*, supra, 76 S Ct at 591 (Justice Frankfurter, concurring).

under the Due Process Clause, be "accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper,"* as the formidable first Justice Harlan wrote for the Court over a century ago. The Due Process Clause simply has nothing to say about whether provision of a discretionary first appeal rather than a first appeal of right requires the appointment of counsel, for that Clause does not require the existence of the process of an appeal of any sort in the first instance. This leaves the Equal Protection Clause as the only possible source of a constitutional command that counsel be appointed on a discretionary first appeal, for though the Due Process Clause does not require the process of an appeal, if the State decides, by law, to provide for an appeal, then it must not deny to any person the "equal protection" of that law.

B. <u>Equal Protection and Appeals</u>

The respondent, however, can find no succor in the Equal Protection Clause. That Clause "confers no substantive rights and creates no substantive liberties."[12] The equal protection claim is that those who have sufficient funds can hire counsel to represent them to prepare and file an application for leave to appeal, while those without sufficient funds are without counsel unless the State assists them by providing counsel at State expense. Does the Equal Protection Clause require that the State provide this affirmative assistance, or is this a matter for the political branches of government to decide?

As an initial matter, amicus has trouble understanding how a constitutional provision establishing a neutral method of seeking review of a conviction entered by way of a plea of guilty is nonetheless discriminatory against the poor and

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12. *San Antonio Independent School District* v *Rodriquez*, 411 US 1, 93 S Ct 1278, 1309, 36 L Ed 2d 16 (1973)(Stewart, J., concurring).

denies "any person...equal protection of the laws" simply because some people will be unable to pay for counsel to assist them in seeking review,[13] for it cannot be gainsaid that the portion of Article 1, § 20 in question is neutral on its face. Though reasonable people can perhaps disagree regarding the wisdom of the 1994 amendment, there is no question that its purpose was non-discriminatory. The genesis of the amendment was a backlog in the Michigan Court of Appeals causing at least a two year delay from the filing of an appeal to decision.[14] Pursuant to the call of the President of the State Bar of Michigan, the State Bar Board of Commissioners created a special Task Force to study the backlog problem, and that Task Force recommended a constitutional change in guilty plea appeals, so that where the defendant was made aware of the sentence to be imposed prior to the plea, and that sentence was imposed, appeal would be by leave; the Task Force also expressed its view that the right to a transcript and to counsel should remain.[15] These recommendations ultimately became the amendment to Article 1, § 20, eliminating the appeal of right in guilty plea and nolo contendere convictions, and saying nothing about counsel.

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13. Cf. *Washington* v *Davis*, 426 US 229, 96 S Ct 2040, 2050, 48 L Ed 2d 597 (1976)"As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 96 S Ct at 2050.

14. See Robert Webster, "Introduction to the Report of the Task Force on Appellate Courts," 7 Mich B J 895 (1993).

15. See 7 Mich B J at 898, and also Mr. Ward's dissent at 903-904

The Amendment is the law of Michigan, and it cannot be argued that there was any purpose on the part of the Legislature or the People of the State to discriminate against the poor. An equal protection claim thus must rest on an argument that the Amendment has a "disparate impact" on the indigent, who will be less able to avail themselves of the application for leave process successfully than those who can afford to retain counsel. But under well-settled equal protection doctrine, disparate impact, even if proven, is insufficient to raise a constitutional claim as against a facially neutral statute (or constitutional provision).[16]

That a "disparate impact" is insufficient to support an equal protection claim was made absolutely clear by this Court in *Washington v Davis*. The claim brought was that a portion of an employment test for police officer in the District of Columbia, neutral on its face, denied equal protection to black applicants because a higher percentage of black applicants failed that portion of the test than did Caucasian applicants. The Court disagreed, observing that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[17] A discriminatory *purpose* is a necessary part of an equal protection claim, for a "rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions

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16. See *San Antonio Independent School District*, supra, rejecting a claim that Texas school financing denied equal protection of the law to the poor, makes the point, observing that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 93 S Ct at 1292.

17. 96 S Ct at 2046.

about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more *burdensome to the poor* and to the average black than to the more affluent white."[18]

Davis was followed in *Village of Arlington Heights* v *Metropolitan Housing Development*.[19] An equal protection challenge to zoning requirements which prevented the building of multi-family low income housing was rejected as absent was any showing of discriminatory purpose. *Davis* made it clear, said the Court, that an official action "will not be held unconstitutional solely because it results in a ...disproportionate impact;" rather, "(p)roof of ...discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *Davis* simply reaffirming "a principle well established in a variety of contexts." 97 S Ct at 563 (see also *Smith* v *Boyle*, 144 F3d 1060, 1064 (CA 7, 1998): "...to be actionable a denial of equal protection must be intentional....disparate impact–a law's unintentionally bearing harder on one group than another–is not a permissible basis for finding a denial of equal protection"; *McLean* v *Crabtree*, 173 F3d 1176, 1185 (CA 9, 1999): "...discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"; *Keevan* v *Smith*, 100 F3d 644, 651 (CA 8, 1996): "Because the policy challenged by the appellants is neutral on its face, the female prisoners must establish that the alleged disparate impact is the result of discriminatory purpose," the court rejecting a claim that a prison industry program discriminated on the ground of sex; *Black* v *Secretary of Health and Human Services*, 93 F3d 781, 788 (CA Fed, 1996): the court rejecting a claim of equal protection based on

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18. 96 S Ct at 2050 (emphasis supplied).

19. *Village of Arlington Heights* v *Metropolitan Housing Development*, 429 US 252, 97 S Ct 555, 50 L Ed 2d 450 (1977).

indigency, noting that "...the fact that the statute may have a *disparate impact on indigents* does not call for heightened scrutiny under equal protection principles"; *Tucker* v *United States Department of Commerce*, 958 F2d 1411, 1413-1414 (CA 7, 1992): rejecting a "census undercount" claim, remarking that the "..only discrimination forbidden by (the Equal Protection Clause) is intentional discrimination. Disparate impact, which means the unintended consequences of measures adopted for reasons unrelated to any intention to discriminate, is not, under this Court's current interpretation of the Constitution, an acceptable basis for a finding of unconstitutional discrimination...."

Moreover, even if it could be shown that the legislature and/or the People of the State had intentionally created a classification based on ability to pay, "neither indigents nor prisoners are a suspect class," so that "such differentiation is permissible as long as even a rational basis for the differing treatment can be shown."[20] While reasonable people might disagree as to whether the Amendment to Article 1, § 20 is sound policy, no reasonable person could support a contention that it is unsupported by a "rational basis." It is certainly rational to treat guilty plea cases and convictions arising from trials differently in terms of appeal.

Under current Equal Protection Clause principles, then, there can be no successful claim that the Clause requires the appointment of counsel for a discretionary first appeal because there can be shown no intent to discriminate, and a failure to "carry (the) burden of proving that discriminatory purpose was a motivating factor....ends the constitutional inquiry....(proof of) a discriminatory 'ultimate effect' is

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20. *Wilson* v *Yaklich*, 148 F3d 596 (CA 6, 1998); see also San Antonio Independent School District, supra; *Harris* v *McRae*, 448 US 297, 100 S Ct 2671, 65 L Ed 2d 784 (1980).

without independent constitutional significance."[21] Moreover, even if a "discriminatory purpose" could be shown, the classification is supported by a rational basis.

III. "Access to The Courts"

A. Griffin, Douglas, and Moffitt

Analysis should begin with *Griffin*. That case involved a state appeal of right from a criminal conviction, the question being whether the State of Illinois could "administer this statute so as to deny adequate appellate review to the poor while granting such review to all others" by requiring that all appellants, without regard to ability to pay, file a bill of exceptions, which could not be prepared without a transcript of the trial proceedings. The plurality addressed the question under the "Due Process and Equal Protection Clauses of the Fourteenth Amendment," without differentiating the two, but the opinion of Justice Black clearly sounds in equal protection. That opinion agreed that a State is "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but held that when a State does grant appellate review it cannot do so in a way "that discriminates against some convicted defendants on account of their poverty," the convicted defendants being protected "from invidious discriminations." Concluding that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," the Court held that either a transcript must be provided or some "other means of affording adequate and effective appellate review to indigent defendants."[22] Justice Frankfurter concurred, supplying the fifth vote, on equal protection grounds. Though, he said, "a

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21. *Arlington Heights*, supra, 97 S Ct at 566.

22. 76 S Ct at 590-591.

State need not equalize economic conditions," where it has provided a right to appellate review of convictions it cannot set up a system which in effect *completely forecloses* the indigent from its use.[23]

Justice Burton, for himself and Justices Minton, Reed, and Harlan, dissented. The Illinois system could not, Justice Burton said, deny due process, given that the process of an appeal is not required by the constitution at all as a necessary prerequisite to the taking of liberty pursuant to a criminal conviction. An equal protection question could be raised, but the claim would be unavailing, for the State is not required to equalize economic conditions before its bar of justice, and the law was neutral ("open to all") on its face, a discussion presaging *Davis* and *Arlington Heights*. Justice Harlan in a separate dissent also found no due process or equal protection violations, for the statute was in fact neutral, and what the majority had decided was not that the State of Illinois had discriminated but that it had a duty *to* discriminate. Again, the language sounds much like the modern equal protection analysis in *Davis*, *Arlington Heights*, and many other cases. To the extent a rationale can be discerned from the case, it is an equal protection case, employing an analysis that is today clearly discredited.

In much the same vein is *Douglas*. Again the case concerned an appeal granted by state law as of right to a convicted defendant. The petitioners were denied their request for appointment of counsel on the appeal of right. The Court agreed with the dissenting justice in the California Supreme Court that "denial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin*...."[24] The majority held that as with *Griffin* "the evil is the same–discrimination against the indigent," which it found could not be permitted

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23. 76 S Ct at 592-593.

24. 83 S Ct at 815.

"with the first appeal, granted as a matter of right to rich and poor alike... from a criminal conviction."[25] Only a fleeting reference was made to any constitutional provision compelling the appointment of counsel–the 14th Amendment–and no mention was made of some separate right of "meaningful access to the appellate process." The ground of decision, from the language employed, was plainly one of equal protection, through an analysis that no longer obtains in equal protection jurisprudence, the statute being neutral on its face, and there being no demonstration of any purposeful discrimination. Justice Harlan dissented once again, rejecting the analysis of the majority in language that is strikingly similar to contemporary equal protection doctrine:

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.....no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purpose of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses....Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative

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25. 83 S Ct at 816.

> duty to lift the handicaps flowing from differences in economic circumstances.[26]

This opinion, as can readily be seen, reads precisely like modern equal protection cases.

The Court in *Ross v Moffitt*, supra, declined to extend *Douglas* beyond the "first appeal of right" to require counsel "for discretionary state appeals and for applications for review in this Court."[27] The Court held that *Griffin* and related decisions concerned "state-imposed financial barriers" which effectively "*cut off* appeal rights for indigents while leaving open avenues of appeal for more affluent persons," while *Douglas*, to insure that an indigent's "access to the appellate system was adequate," had required the appointment of counsel for "initial appeals as of right." And even *Douglas*, the Court quoted, had observed that a "state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination....Absolute equality is not required; *lines can be and are drawn and we often sustain them*."[28]

The ground of decision in *Griffin* and *Douglas* was difficult to discern, found the Court in *Moffitt*. To the extent that Due Process or Equal Protection were employed in those cases, the Court did not believe that either Clause could be viewed as commanding the appointment of counsel for a discretionary appeal. The Court contrasted the appeal from the trial, as in the appeal "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." The question of appointment of counsel under due process

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26. 83 S Ct at 361-362.

27. 94 S Ct at 2438.

28. 94 S Ct at 2443 (emphasis supplied).

principles, the Court said, makes little sense in the context of an appeal, given that there is no Due Process right to an appeal at all; rather, the "question is more profitably considered under an equal protection analysis." The Court concluded that *Griffin*, *Douglas*, and similar cases stand for the proposition that the indigent defendant cannot be "entirely cut off from any appeal at all" or left with a "meaningless ritual,"[29] and that provision of counsel for a discretionary appeal is not required by Equal Protection principles. Once again, under current equal protection principles the issue would be readily resolved: the existence of a neutral statute, and the absence of a discriminatory intent, would be the end of the inquiry.

Griffin, *Douglas*, and *Moffitt*[30] do not establish any right to "meaningful access to the appellate process" as a part of Due Process, which would, given the lack of a right to an appellate process at all, be impossible; the most that can be said is that the cases preclude the *foreclosure* of an appeal to an indigent that is available to those with funds, or the provision of a "meaningless ritual" to the indigent, and this on an Equal Protection rationale which has been *repudiated by current Equal Protection doctrine*. Given current Equal Protection doctrine, the cases have no constitutional foundation. This is not to say that this Court must necessarily overrule them. But it is certainly appropriate for the Court not to *extend* them; that is, to say, "this far, and no further," given the lack of a constitutional command allowing the exercise of judicial authority to compel the appointment of counsel for an indigent defendant on a discretionary appeal, be it the "first"

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29. 94 S Ct at 2444

30. And, of course, *Moffitt* has been followed: see *Wainwright* v *Torna*, 455 US 586, 102 S Ct 1300, 71 L Ed 2d 475 (1982) and *Pennsylvania v Finley*, supra ("...the right to appointed counsel extends to the first appeal of right, and no further").

appeal or not. There is simply no escaping that the Due Process Clause cannot be violated by the manner in which process is given when that process is not required at all by the Due Process Clause, and that Equal Protection cannot be violated absent discriminatory purpose with a neutral law, which is lacking in this case.

B. "Access to the Courts" and the "Prisoner's Rights" Cases

The case generally recognized as the progenitor of the "access to the courts" constitutional doctrine is *Ex parte Hull*.[31] *Hull* concerned a prison regulation requiring that petitions for habeas corpus be submitted by inmates to a prison administrator for a determination that they were "properly drawn" before filing with the federal court. If the administrator did not approve the petition, it could not be filed. This Court simply held that whether a petition for a writ of habeas corpus addressed to a federal court is "properly drawn" is not a matter for determination by the executive branch of government through its bureaucracy, but for the "court alone to determine." No affirmative obligations by way of assistance to the prisoner were required in *Hull*; rather, the Court held that the executive branch has no business blocking ("abridging or impairing") the filing by prisoners of petitions with a court.

The second lead case, *Johnson* v *Avery*,[32] also imposed no obligation of assistance on the State, instead precluding a different form of State "abridgement or impairment" of inmates filing of legal papers in a federal court. The prison regulation in the Tennessee prison

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31. *Ex parte Hull*, 312 US 546, 61 S Ct 640, 85 L Ed 1034 (1941)

32. *Johnson* v *Avery*, 393 US 483, 89 S Ct 747, 21 L Ed 2d 718 (1969)

prevented inmates from advising or assisting one another in the preparation of habeas corpus petitions. Given the isolation of inmates from the general population, the rule had the effect, held the Court, of a rule which forbade illiterate or poorly educated prisoners from filing habeas corpus petitions. In the absence of the provision of some other alternative, the regulation thus denied some prisoners access to the court in violation of *Hull*. *Avery* was then followed in *Wolff* v *McDonnell*.[33] Taking up the invitation of the Court in *Avery*, the Nebraska prison system precluded inmates from assisting one another generally in the preparation of petitions for habeas corpus and civil rights actions, instead providing an alternative, an inmate legal advisor, appointed by the Warden. The Court held that *Avery* extends to civil rights petitions as well as habeas corpus petitions, and directed that the district court hold a hearing to determine the adequacy of the assistance provided by the inmate legal advisor "under the reasonable-alternative standard of *Avery*."[34] Other than the extension to civil rights actions, the rationale of the decision was precisely that of *Avery*–avoidance of the denial to an illiterate or poorly educated inmate of the ability to file a civil rights action. Then came *Bounds* v *Smith*,[35] to be repudiated in part in *Lewis* v *Casey*, supra.

Bounds conflated the *Griffin/Douglas* line of cases–decided, as has been discussed, on an equal protection theory which the Court had made clear *in Davis* was no longer the law, those cases and their validity not being, however, before the Court in *Davis*–with the *Hull/Avery/Wolff* line of cases, decided on the due process theory that access to

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33. *Wolff* v *McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974).

34. 94 S Ct at 2986.

35. *Bounds* v *Smith*, 430 US 817, 97 S Ct 1491, 52 L Ed 2d 72 (1977),

the federal courts to file original habeas corpus petitions and original civil rights actions cannot be "abridged or impaired" by the State, but providing no obligation of affirmative assistance on the State, to invent an affirmative obligation on the part of the State to provide either an adequate law library for inmate use or some reasonable alternative, such as the assistance of "persons trained in the law." The Chief Justice, Justice Rehnquist, and Justice Stewart dissented, Justice Rehnquist arguing that the Court had created the right it was announcing "virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."[36]

The Court drew back to a degree, however, in *Lewis v Casey*.[37] Inmates in the Arizona Department of Corrections filed a federal lawsuit pursuant to *Bounds* on the ground that the legal assistance provided by the prison system was inadequate. The federal district court entered an injunctive order specifying in minute detail the hours for the prison library, the hours of use of the library per week to which an inmate was entitled, the minimum educational requirements for the prison librarians (a library science, paralegal, or law degree), the content of a videotaped legal-research course for inmates which the court required be prepared, the regulations for access to the library by prisoners in disciplinary or security segregation, that illiterate and non-English speaking inmates be provided direct assistance from lawyers, paralegals, or a sufficient number of prisoner legal assistants, that bilingual inmates be located and trained as legal assistants, and the like. This Court reversed.

The Court agreed with the State that the systemic challenge of the inmates was unsupported by the record, their being no proof of widespread actual injury under *Bounds*, the

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36. 97 S Ct at 1503.

37. *Lewis v Casey*, 518 US 343, 116 S Ct 2174, 135 L Ed 2d 606 (1996).

district court doing no more than identifying isolated instances of injury. But beyond this the Court also retreated from *Bounds*, remarking that:

> it must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied....These statements appear to suggest that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court....These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, *and we now disclaim them*....the tools (*Bounds*) requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.[38]

Inmates do not have a right to become "litigating engines"–they have no right to the assistance of the State to help them "to discover grievances, and to litigate effectively once in court."[39] Rather, because of the "fundamental importance in our constitutional scheme" of the writ of habeas corpus, an original civil action in the federal courts, "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[40] Because the Court could find "no reasonable distinction" between the original action of a petition for writ of habeas corpus and a civil rights action, alleging constitutional error in the manner of treatment or confinement of a prisoner, the Court in *Wolff* held that *Avery* applies to civil rights actions, finding also in

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37. 116 S Ct at 2181 (emphasis supplied).

38. *Lewis v Casey*, 116 S Ct at 2181.

39. See *Wolff v McDonnell*, 94 S Ct at 2985.

these cases that without some form of assistance through either legal assistants or the provision of a law library inmates' ability to have access to the courts to file these original actions is, as a practical matter, "impaired or obstructed." The right to counsel clearly is not required in these cases.

This right of access to the courts cannot, of course, belong only to inmates of correctional institutions, lodged there after a conviction, and who have no due process right to challenge their conviction further through an appellate process, but *must belong to the **innocent** as well to **all** of us!* The innocent, however, are not being held in custody, but may wish to bring, in certain circumstances, civil rights actions against the Government. Civil rights actions are scarcely the private domain of the criminally convicted. If a citizen wishes to bring a civil rights action against the Government he or she will not be forgiven the filing fee, will not be provided counsel, and will not be provided either a law library or a legal assistant. Can it be that those convicted of a crime and incarcerated have a right of access to the courts to file original actions challenging the actions of the Government superior to that of innocent citizens? How can this difference in treatment be explained?

Amicus submits that the difference in treatment can only sensibly be explained in one way. As has been explained, the Equal Protection Clause serves no function of "equalizing economic conditions" or opportunities, and so all ordinary citizens, at least hypothetically, have access to the courts, to legal assistants, and to law libraries in that *they are available* if one can avail him or herself of them. But an inmate, by virtue of his or her confinement, has no such hypothetical or possible access; he or she cannot visit a public library, or call upon friends and neighbors for legal advice. His or her access to the courts *to challenge an action or actions of the Government as it affects the inmate personally* is "abridged or restricted" by the *fact* of confinement, though the fact of that confinement be consistent with Due Process of Law.

To the extent there exists a right to "access to the courts," then, it perforce belongs to all citizens and not only inmates, and prevents civil rights actions against the Government from being "impaired or abridged." While for ordinary citizens the Government is under no duty to provide any affirmative assistance whatsoever to the citizen who sues or wishes to sue because that individual at least has the hypothetical opportunity to gain whatever legal assistance may be necessary, including through access to legal materials, the inmate lacks this hypothetical opportunity unless the Government assists him either through the provision of legal materials or in some other manner–but the appointment of counsel is not required.

IV. Conclusion

There can be no "Due Process" right to "meaningful access" to the appellate process, as liberty may be restrained consistent with Due Process of law after a criminal conviction without any appellate process. *Griffin*, *Douglas*, and *Moffitt* are in truth Equal Protection Clause cases, establishing a right to a transcript and the right to counsel on an *appeal of right*, but based on an equal protection theory *which has been firmly and repeatedly repudiated*. An equal protection violation requires a discriminatory motive, which is absent from these cases and from the present case.

Whether counsel should be provided an indigent defendant convicted by way of plea who wishes to invoke a mechanism for discretionary review is a matter for the political branches of government. No provision of the Constitution can justify judicial intervention, unless we are to "render democratically adopted texts mere springboards for judicial lawmaking."[41]

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40. Scalia, *A Matter of Interpretation*, p.25 (Princeton University Press, 1997).

RELIEF

WHEREFORE, amicus submits that the 6th Circuit Court of Appeals should be reversed.

Respectfully submitted,

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19D